United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17,765

CARMEN GONZALEZ, ET AL.,

Appellants,

v.

ORVILLE L. FREEMAN, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

Summary judgment was granted to the Commodity Credit Corporation, a government agency, and its directors, dismissing a complaint charging them with having unlawfully blacklisted appellants for a five-year period from seeking to purchase surplus agricultural commodities from the Commodity Credit Corporation. The questions presented are:

1. Whether the blacklisting:
   a) Is a penalty unauthorized by law where the only legitimate interest of the agency is to obtain the best monetary consideration for the commodities;
   b) May be validly accomplished in the absence of regulations specifying grounds therefor and establishing a procedure for its effectuation;
   c) May be validly accomplished in the absence of notice specifying grounds for the blacklisting and affording the party affected with an opportunity to refute said grounds.
2. Whether summary judgment was properly granted to appellees and denied appellants when the record shows that appellees failed to provide the elements of due process in taking final agency action adverse to appellants.

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TREATISES

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from an order entered February 1, 1963, granting summary judgment for the appellees in an action for a declaratory judgment and injunction filed by appellants in the United States District Court for The District of Columbia.[1]

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[1] Henceforth the parties will be referred to as below, plaintiffs and defendants.

Notice of Appeal was filed February 26, 1963. Jurisdiction of this appeal is granted by 28 U.S.C. §1291.

STATEMENT OF CASE

On January 13, 1960, Walter C. Berger, then a vice-president of the defendant, Commodity Credit Corporation (CCC), wired the plaintiff, Thos. P. Gonzalez Corporation, that "effective immediately the Thos. P. Gonzalez Corporation, its officers and affiliates are suspended from participating in any programs of the Commodity Credit Corporation . . ." The suspension, according to the telegram, was to continue "pending the completion of an investigation regarding the misuse of certificates issued by Commodity Credit Corporation for approximately 17,700 hundredweight of beans sold to Thos. P. Gonzalez Corporation for export" (J.A. 6, 11).

Prior to receipt of this telegram, during the years 1951 through 1959, the plaintiffs Thomas P. Gonzalez and Thos. P. Gonzalez Corporation, had purchased for export from the Commodity Credit Corporation over $7 million worth of agricultural commodities (J.A. 13, 14). Such purchases constituted about thirty percent (30%) of these plaintiffs' business. Denied the opportunity to bid on surplus agricultural commodities sold by the Commodity Credit Corporation, these plaintiffs were foreclosed from continuing a large part of their agricultural commodity export business (J.A. 14).

Subsequently in 1960, an attempt was made by the Thos. P. Gonzalez Corporation to have the suspension lifted and to post a bond in lieu thereof, guaranteeing the performance of contractual obligations resulting from future purchases of surplus agricultural commodities from the Commodity Credit Corporation (J.A. 32).

On October 30, 1960, Andrew J. Mair, a vice president of the Commodity Credit Corporation, informed the plaintiff Thomas P. Gonzalez that the suspension would continue in effect "until the Department of Justice has concluded its determination and action in this matter" (J.A. 33). Subsequently, the action of the Department of Justice was concluded when on January 17, 1962, Thomas P. Gonzalez pleaded guilty to an information charging him with violating 7 U.S.C. § 1622(h) by making a false statement to the Bank of America. The Court suspended the imposition of a $200.00 fine (J.A. 11, 35).

Because the determination and action of the Department of Justice had been concluded, plaintiffs attempted, beginning on or about February 27, 1962, to obtain a lifting of the suspension effected January 13, 1960 (J.A. 16). Finally, on May 24, 1962, a letter, signed by defendant Godfrey, the Executive Vice President of the CCC, was sent to Thomas P. Gonzalez which stated that the:

> "Thos. P. Gonzalez Corporation, its officers, Thomas P. Gonzalez and Carmen Gonzalez, and any firms in which Thomas P. Gonzalez and Carmen Gonzalez may be a partner or officer . . . have been debarred from participating in any programs financed by the Commodity Credit Corporation for a period of five years . . . effective as of January 13, 1960, the date on which the above-named firms were suspended from participating in any programs of Commodity Credit Corporation" (J.A. 24).

On May 17, 1962, plaintiffs' attorneys, having been advised orally of the decision reflected in Mr. Godfrey's letter of May 24, 1962, protested by letter to the Secretary of Agriculture, defendant Freeman, that this new debarment had been accomplished without providing plaintiffs with notice of the specific grounds upon which it was based and without according plaintiffs the right of examination of the persons who had alleged the existence of said grounds, if any there be (J.A. 21). Subsequently, on July 5, 1962, defendant Freeman

finally affirmed the new debarment invoked by the Commodity Credit Corporation in May (J.A. 29).

Plaintiffs then filed the action below for a declaratory judgment that the plaintiffs are eligible to participate in any and all programs of the Commodity Credit Corporation and for an injunction to compel the individual defendants to cease from continuing in effect the debarment of plaintiffs (J.A. 4).

Plaintiffs moved for summary judgment on November 7, 1962 (J.A. 2, 10). On November 16, 1962, defendants moved to dismiss the complaint and also filed an alternative cross-motion for summary judgment (J.A. 3, 36). With respect to defendants' cross-motion for summary judgment, on November 28, 1962, plaintiffs served a notice of taking of deposition of one Rulon Gibb whose affidavit was relied upon in support of said motion, the deposition being set for December 10, 1962. On November 30, 1962, defendants filed a motion for a protective order with respect to the taking of the deposition (J.A. 37). The protective order was granted on December 13, 1962, and entered on December 19, 1962, and stayed all discovery until after the resolution of the pending cross-motions for summary judgment and defendants' motion to dismiss (J.A. 39).

Plaintiffs then, on December 19, 1962, moved to strike two principal affidavits supporting defendants' motion for summary judgment (J.A. 3). Plaintiffs' motion to strike was granted on February 1, 1963 in the same order denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment (J.A. 42). No memorandum opinion was filed.

STATEMENT OF POINTS

1. The District Court erred in granting Defendants' Motion for Summary Judgment.

2. The District Court erred in denying Plaintiffs' Motion for Summary Judgment.

3. The District Court erred in upholding Defendants' debarment of plaintiffs:

a) which was imposed in the absence of rules or regulations specifying grounds for debarment or establishing a procedure for accomplishing debarment;

b) which was finally accomplished without giving plaintiffs notice of the charges relied upon in support of debarment and without affording plaintiffs a meaningful opportunity to refute said charges;

c) which was accomplished by means wholly inconsonant with due process of law.

4. The District Court erred in entering summary judgment for defendants in that the affidavits of Rulon Gibb and Ford M. Milan, which defendants principally relied upon in support of their motion, were stricken from the record, thereby leaving defendants' contentions entirely unsupported, and in denying plaintiffs' motion for summary judgment when the record showed unequivocally that plaintiffs were denied due process of law.

5. The District Court erred in upholding defendants' debarment of plaintiff Carmen Gonzalez in that no basis was presented for her debarment.

SUMMARY OF ARGUMENT

I

By issuing a final order which debarred plaintiffs from participating in any program financed by the CCC, defendants deprived plaintiffs of the opportunity to seek the purchase of surplus agricultural commodities controlled and offered for sale by that Agency. In accomplishing such action, the defendants violated plaintiffs' rights to due process of law in that no notice of the threatened action had ever been provided prior to the imposition of the sanction; no hearing had ever been held by which plaintiffs could counter the allegations made by defendants; and no regulations had ever been published by defendants which provided either a procedure or other general guidelines for the taking of such action. In the absence of each of these essential requisites, the debarment order is invalid. Willner v. Committee on Character and Fitness, 31 LW 4439 (May 13, 1963); Greene v. McElroy, 360 U.S. 474 (1959); Morgan v. United States, 304 U.S. 1 (1938); Hotch v. United States, 212 F. 2d 280 (9th Cir., 1954); Administrative Procedure Act § 3(a), 5 U.S.C. 1002.

II

Summary judgment in favor of the defendants should not have been granted where the record established that the basic elements of due process of law were lacking to support defendants' action of debarment. Rather, in such circumstances, the District Court should have granted summary judgment for the plaintiffs.

III

Regardless of authority or adherence to the fundamentals of due process of law, a sanction imposed by an administrative agency having as its purpose the punishment of the parties affected cannot

stand, particularly where it is not in implementation of the Congressional purposes sought to be accomplished by the Agency involved. L.P. Steuart & Bro. v. Bowles, 322 U.S. 398 (1944); Copper Plumbing and Heating Co. v. Campbell, 110 U.S. App. D.C. 177, 290 F. 2d 368 (1961).

IV

None of the data ever submitted to the Court by defendants to justify plaintiffs' debarment relates in any manner to plaintiff Carmen Gonzalez; the order debarring her is wholly unsupported and cannot stand.

ARGUMENT

I. FINAL AGENCY ACTION BLACKLISTING A PARTY FROM BIDDING FOR THE PURCHASE OF GOVERNMENT CONTROLLED SURPLUS AGRICULTURAL COMMODITIES MAY BE ACCOMPLISHED ONLY IN ACCORDANCE WITH DUE PROCESS OF LAW

A. Before Agency Action Imposing A Sanction May Be Taken, Due Process Requires That Notice And An Opportunity To Oppose Such Action Be Provided To The Party Adversely Affected

Before an administrative agency may exercise final action of an adjudicatory nature affecting the rights of a person, in order to satisfy the Constitutional requisites of due process of law, the agency must accord to the party concerned notice and an opportunity to be heard. Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153 (1941); Morgan v. United States, 304 U.S. 1, 14 (1938); Parker v. Lester, 227 F. 2d 708, 716 (9th Cir., 1955); Magnolia Petroleum v. Carter Oil Co., 218 F. 2d 1, 6 (10th Cir., 1954), cert. denied, 349 U.S. 916. There is no dispute but that prior to the imposition of the suspension imposed by the telegram of January 13, 1960, plaintiffs had the right to seek

to purchase surplus agricultural commodities offered for sale by the CCC. The defendants summarily terminated this right on January 13, 1960, without providing plaintiffs an opportunity to show why such suspension should not be effected. It may be academic whether or not prior to the imposition of this summary suspension, which was to last temporarily "pending the completion of an investigation", the plaintiffs had any legal right to prior notice and a hearing. Cf. R.A. Holman & Co., Inc. v. Securities and Exchange Commission, 112 U.S. App. D.C. 43, 47, 299 F. 2d 127, 131 (1962). But it is well established that such notice and hearing opportunity is essential prior to final agency action invoking debarment.

By its own terms the summary suspension was to last only until the Department of Justice concluded its determination and action relating to an alleged misuse of certificates. Yet, notwithstanding the conclusion of such determination and action in January, 1962, the defendants, in May, 1962, without providing plaintiffs with notice and charges and without providing plaintiffs a meaningful opportunity to answer such charges or confront the persons making them, took final action adverse to the plaintiffs and imposed a "debarment", retroactive to January 13, 1960, which is to last until January 13, 1965. Such debarment precludes plaintiffs from seeking to purchase government commodities of the type which they had purchased theretofore and thereby deprives plaintiffs of a substantial portion of their business upon which their livelihood is based.

It is submitted that this debarment, on its face, was accomplished in complete discordance with the requisites of due process of law. No notice was ever provided to plaintiffs that the CCC contemplated a debarment, or any action whatever, in the nature of a sanction. No opportunity was ever provided to the plaintiffs to refute the grounds relied upon by defendants to support the sanction. All fact-finding involved in defendants' action, if any there was, was accomplished on

an ex parte basis utilizing only material which defendants themselves saw fit to consider. Due process requires that plaintiffs be permitted the opportunity to contest such charges. The existence of the rights which plaintiffs herein seek to vindicate were most recently reaffirmed by the Supreme Court in Willner v. Committee on Character and Fitness, 31 LW 4439, 4441 (May 13, 1963), where the Court held that an applicant was denied procedural due process when he was denied admission to the Bar without a hearing on the charges against him. Furthermore, the Court specified that a right to a hearing includes the right to know the matters being considered, what the Government proposes, the bases for the proposal, and the right to present evidence that actually will be considered. In Greene v. McElroy, 360 U.S. 474, 493, 507-8 (1959), the Court held that in the absence of explicit authorization from either the President or Congress, officials of the Department of Defense could not deprive Greene of his engineering job through revocation of his security clearance in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination. In Gonzales v. United States, 348 U.S. 407 (1955), the Court reversed a conviction for refusal to submit to induction. The Court agreed with Gonzales' contention that his classification was invalid because he was not furnished a copy of the Justice Department's recommendation to the Appeal Board and accorded an opportunity to reply thereto. The Court held that Gonzales "was entitled to know the thrust of the Department's recommendation so that he could muster his facts and arguments to meet its contentions". 348 U.S. at 414. Furthermore, "just as the right to a hearing means the right to a meaningful hearing . . . so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered", 384 U.S. at 415. The concept of what is required of an

agency in making an administrative determination is succinctly set out in Morgan v. United States, 304 U.S. 1, 314-15, 318-19 (1938):

> "in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' -- essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'"
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> * * *
>
> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposal before it issues its final command."

Or, as more recently stated, "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process". Hannah v. Larche, 363 U.S. 420, 442 (1960).

In Homer v. Richmond, 110 U.S. App. D.C. 226, 229, 292 F. 2d 719, 722 (1961), this Court stated, with respect to the validity of the denial of radio operators' licenses by the Coast Guard Commandant, that the question before it was whether persons might be "deprived of an employment opportunity in private industry by governmental action which does not meet the requirements of the Due Process Clause of the Fifth Amendment." In holding that the requirements of due process were not satisfied by the Commandant's action, this Court concluded that "the difficulty is that [two of the applicants] were not

given a hearing or opportunity to meet the charges". 110 U.S. App. D.C. at 231, 292 F. 2d at 724. This Court further stated that if, after remand, should the licenses ultimately be denied, "the validity of the denial would depend upon whether the grounds finally relied upon [by the Commandant] are admitted or are established by reliable evidence . . . and upon whether the criteria of the Constitution as well as of the statute are met substantively and under procedures which afford the applicant an opportunity, consistently with due process of law, fairly to test the factual accuracy of the grounds upon which denial is placed." Ibid. Thus in respect to any deprivation by a governmental agency the Court admonished that "one may not have a Constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." 110 U.S. App. D.C. at 229, 292 F. 2d at 722.

In this case, the elements of due process are wholly lacking in that plaintiffs have been blacklisted by the defendants without having had a hearing or an opportunity to meet the charges against them. Plaintiffs have thus been deprived of a business opportunity (if not an employment opportunity) in private industry. Consequently, on the precedent of Homer v. Richmond alone, plaintiffs have been denied due process of law.

B. An Orderly Procedure Must Be Established And Followed By An Agency Before It May Take Final Action In The Nature of A Sanction

Section 3(a) of the Administrative Procedure Act, 5 U.S.C. § 1002 (a) Provides, in part, that:

> "(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests;

> (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published." (Emphasis added.)

Even assuming that the CCC has the legal authority to impose sanctions upon persons, by virtue of the requirements of Section 3(a) of the Administrative Procedure Act, it is obvious that no sanctions may be imposed unless accomplished in conformity with regulations duly promulgated by that Agency. See, Hotch v. United States, 212 F. 2d 280 (9th Cir., 1954); Pinkus v. Reilly, 157 F. Supp. 548 (D.N.J., 1957).

With respect to the sanction that was levied against plaintiffs by defendants' action in May, 1962, as affirmed by defendant Freeman in July 1962, it is to be noted that no regulations whatever have been published by the CCC which provides either a procedure or any other basic guidelines. The action of defendants in this respect is virtually unprecedented. In L.P. Steuart & Bro. v. Bowles, 322 U.S. 398 (1944), the Court made specific reference to the regulations which informed of the possibility of suspension and referred also to the procedures followed with respect to the issuance of suspension orders. 322 U.S. at 40, n. 8 at 40. In Copper Plumbing & Heating Co. v. Campbell, 110 U.S. App. D.C. 177, 290 F.2d 368 (1961), the necessity for existing regulations is apparent.

It is clear that whatever the process may have been which was utilized by the defendants in ordering the plaintiffs debarred, such process was an "adjudication" within the meaning of Section 2(d) of the

Administrative Procedure Act, 5 U.S.C. 1001(d), and that the debarment itself is a "sanction" within the meaning of Section 2(f), 5 U.S.C. 1001(f). Consequently, on the principles of the cases cited on page 7, a hearing is required. While such a hearing need not of necessity be conducted in the manner specified by Section 5 of the Administrative Procedure Act, 5 U.S.C. 1004, since that section applies only to cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . ." and no such statutory requirement is here involved, the hearing that must be provided must be a full and fair one, providing opportunity for ascertaining and contesting the bases of the CCC's records and reports. Willner v. Committee on Character and Fitness, 31 LW 4439, 4441 (May 13, 1963).

Not only was no such hearing provided by the defendants here, but also no regulations had been promulgated relating to the conduct of such a hearing. It is questionable whether in the absence of such regulations, any hearing would have been valid. Compare Homer v. Richmond, 110 U.S. App. D.C. 226, 277, 292 F.2d 719, 720 (1961); Schlesinger v. Gates, 101 U.S. App. D.C. 355, 356, 249 F.2d 111, 112 (1957). This is analogous to the situation in Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928) where Mr. Chief Justice Taft pointed out that the practice of giving actual notice to non-resident motorists did not supply constitutional validity to a statute which fails to direct it. As was stated in Coe v. Armour Fertilizer Works, 237 U.S. 413, 424-425 (1915):

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123, 22 L. ed. 72, 77.

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N.Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing.. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S.B. Co. v. Lexington, 203 U.S. 323, 333, 51 L.ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York case). So, in Central of Georgia R. Co. v. Wright, 207 U.S. 127, 138, 52 L.ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In Roller v. Holly, 176 U.S. 398, 409, 44 L.ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in Louisville & N.R. Co. v. Central Stock Yards Co. 212 U.S. 132, 144, 53 L.ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.'"

See, Morgan v. United States, 304 U.S. 1, 18-19 (1938); Gonzales v. United States, 348 U.S. 407, 414 (1955).

Because of their failure to promulgate any regulation establishing standards for debarment or for procedures to accomplish debarment, defendants must be said to have failed to meet the obligation of § 3(a) of the Administrative Procedure Act, 5 U.S.C. § 1002(a). Furthermore, by virtue of defendants' failure to accord plaintiffs any hearing whatsoever, plaintiffs were denied the due process which the Constitution demands be accorded by administrative agencies to persons so situated.

II

REGARDLESS OF THE PROCEDURE UTILIZED BY DEFENDANTS IN ARRIVING AT THEIR DECISION TO DEBAR PLAINTIFFS, THE SANCTION IMPOSED IS NOT RELEVANT OR GERMANE TO THE FUNCTIONS OF THE COMMODITY CREDIT CORPORATION AND IS CONSEQUENTLY A PENALTY UNAUTHORIZED BY LAW, AND THEREFORE IS INVALID

The Supreme Court, in L.P. Steuart & Bro. v. Bowles, 322 U.S. 398, at 404 (1944), stated that an administrative agency may not impose a sanction upon a party if that sanction is used as a means of punishment since "it is for Congress to prescribe the penalties for the laws which it writes." See also, Copper Plumbing & Heating Co. v. Campbell, 110 U.S. App. D.C. 177, 290 F. 2d 368 (1961).

In both Steuart and Copper Plumbing the courts recognized, however, that though the power of suspension was not specifically provided to the agencies concerned by their operative statutes, the suspensions involved were relevant and germane to the functions of those administrative agencies. Consequently, such debarments were construed as implementing Congressional policies and, on that basis, they were upheld notwithstanding that they produced "a very serious blow to an enterprise specializing in such business." 110 U.S. App. D.C. 177 at 181, 290 F. 2d 368, at 372.

In L.P. Steuart, the rationale of the Court was that the war-time purposes of the Office of Price Administration in rationing and allocating fuel oil would be frustrated if a middleman, such as Steuart, was permitted to continue to distribute "a scarce and vital commodity. . . in an inefficient, inequitable and wasteful way." 322 U.S. at 406. However, the Court also noted that "if petitioner [Steuart] established that he was eliminated as a dealer . . . for reasons not relevant to allocation or efficient distribution of fuel oil, quite different considerations would be presented." Ibid. Similarly, in Copper Plumbing, this Court recognized that the suspension of the company was relevant to the accomplishment of the Congressional purposes evidenced by the Eight Hour Laws, 110 U.S. App. D.C. at 181, 290 F.2d at 372; and, consequently, the suspension there involved was upheld.

The considerations which led the courts to uphold the suspensions in Steuart and Copper Plumbing are not present in this case.

The function for which the CCC was established by Congress was primarily one of domestic concern. See 15 U.S.C. 714. In order to aid in achieving stability of farm income and prices and to assist in the maintenance of balanced and adequate supplies of agricultural commodities, the Congress authorized the Agency to "sell any farm commodity owned or controlled by it at any price not prohibited . . .". 7 U.S.C. 1427. With respect to such sales, the Agency was restricted from selling "any basic agricultural commodity or storable non-basic commodity at less than 5 per centum above the current support price for such commodity . . . ." 7 U.S.C. 1427. This restriction does not apply with respect to "sales for export". 7 U.S.C. 1427(F).

Plaintiffs' previous business with CCC has been limited to purchases by them of commodities offered for sale by the CCC. Primarily, such purchases were for export purposes but not necessarily. It is evident, however, that, if the CCC offered commodities for sale, the only question with which it was charged by law to be

concerned with was the price received. If the sale were for domestic use, the price could not be (except in certain circumstances) less than five per cent above the current support price. If the commodity were offered for export, however, a lesser price could be sought. Thus, the only things with which the CCC could be properly concerned with in the case of purchases made by plaintiffs were price and payment.

In debarring plaintiffs for a time definite from seeking to bid for commodites offered for sale by the CCC, the defendants have taken penal action. Unlike the debarments in Steuart and in Copper Plumbing, this action is not at all related to the functions of the Agency in fulfilling congressional policy. Perhaps there are proper sanctions which the defendants could legitimately employ in certain circumstances. With respect to plaintiffs, however, who have merely been customers of the CCC, total debarment is neither proper nor legitimate, whatever the circumstances. The only effect of the debarment is that of penalizing plaintiffs. In no manner does it implement pronounced Congressional purposes. On the basis of Steuart and Copper Plumbing, therefore, the sanction imposed by defendants may not stand irrespective of the procedure utilized in effecting the sanction.

III

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT. THE RECORD BELOW IS INSUFFICIENT TO SHOW ANY BASIS FOR PLAINTIFFS' DEBARMENT, AND THE RECORD BELOW SHOWS UNEQUIVOCALLY THAT PLAINTIFFS WERE DENIED DUE PROCESS OF LAW

Plaintiffs submit that defendants' argument below in support of their motion for summary judgment can be summarized as follows--because the defendants were convinced from their ex parte consideration of data which they themselves had compiled that plaintiffs ought to be debarred from dealings with the CCC, it would be superfluous to

accord the traditional rights of due process of law to plaintiffs since no rebuttal could properly be offered which would affect the conclusions already reached by defendants. Defendants' point is tantamount to saying that in a criminal case, when the prosecutor is absolutely convinced of the defendant's guilt, a trial is merely a dispensable formality; or that, upon review, the appellate courts need only consider whether the accused did or did not commit the act charged and need not concern itself with the procedures of the trial.[2] Consistent with this theory, defendants, on November 16, 1962, submitted a cross-motion for summary judgment supported by a lengthy affidavit of Rulon Gibb, Treasurer of the CCC; an affidavit of Ford Milam, Agricultural Attache, United States Embassy, Rio de Janeiro, Brazil; an affidavit of Doyle Kennedy, Special Agent of the Department of Agriculture; and also one of Raymond R. Abbott, Traffic Manager, Moore McCormack Lines, Inc. The purpose of these affidavits is clear. They were intended to show to the court that these selected materials, relating to dealings with Thomas P. Gonzalez and the Thos. P. Gonzalez Corporation, were themselves adequate to demonstrate that the court would reach the very same conclusion that the defendants did -- that the plaintiffs should be debarred or, in any event, that the defendants' action could not be said to be arbitrary or capricious.

However, even if we assume the validity of defendants' theory, it is unsupported by the record below. Through the affidavit of Rulon Gibb, defendants sought to show a chronology of the transactions between the CCC and plaintiffs Thomas P. Gonzalez and the Thos. P. Gonzalez Corporation. Through the Milam affidavit, defendants sought to show

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[2] As the Supreme Court stated in Rees v. Watertown, 19 Wall. (86 U.S.) 72, 97 (1874), "whether, in fact, the individual has a defense . . . or is without defense, is not important. To assume that he has none and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest."

that a bean shipment to Brazil had resulted in a public uproar causing great damage to the United States agricultural trade and to our relations with Brazil. The Kennedy affidavit is a summary of the investigative report of defendants' special agent. The Abbott affidavit concerns dock receipts issued for beans shipped by the Thos. P. Gonzalez Corporation. It is through these affidavits that defendants justify their action debarring plaintiffs.

On November 28, 1962, plaintiffs served a notice of deposition of Rulon Gibb, to be taken on December 10, 1962, one month prior to the date set for the hearing of the motions for summary judgment. The purpose of the deposition was to probe the accuracy of the recitations and conclusions contained in the Gibb affidavit. On November 30, 1962, defendants moved for a protective order barring all discovery until the resolution of the pending motions. On December 19, 1962, the court below entered an order granting the protective order. On that same day, plaintiffs moved to strike the affidavits of Milam and Gibb on the principal ground that the affidavits failed to conform to the requirements of Rule 56(e) of the Federal Rules of Civil Procedure; in particular that the affidavits contained substantial hearsay, and the affiants were not competent to testify to the matters therein. Plaintiffs' motion to strike was granted on February 1, 1963, in the same order granting summary judgment for defendants.

Subsequent to the hearing of the cross motions for summary judgment on January 10, 1963, defendants caused to be filed with that court certain "administrative records of the Department of Agriculture which were presented to the Court at the hearing on January 10, 1963." No copy of these "administrative records" was ever served upon plaintiffs.

The stricken affidavits of Gibb and Milam presumably were not considered by the court below. By reason of the fact that the "administrative records" were not filed until four days subsequent to

the hearing of the defendants' motion for summary judgment, they also were not properly before that court, since Rule 56(c) of the Federal Rules of Civil Procedure requires service prior to the day of hearing. See, Canning v. Star Publishing Co., 19 F.R.D. 281, 283-4 (D. Del., 1956). Consequently, the record is utterly barren of any data which would provide even disputed factual justification for the sanction imposed by defendants. Without such data, there is no justification for the granting of defendants' motion for summary judgment, even if the court below adopted defendants' theory of the scope of judicial review which could be made of their action.

Even assuming that the "administrative records" could have been considered by the District Court, such consideration should have shown that this "administrative record" was such in name only. In reality, it consists merely of a packet of papers extracted from the files of the Department of Agriculture. It is not a record of an administrative proceeding participated in by plaintiffs in contemplation of the taking, by defendants, of administrative action in the nature of a sanction. There has never been such a proceeding. It is, at most, a record compiled by defendants ex parte to show a basis for the action taken. Apparently, these records were relied upon by defendants in arriving at their decision to debar plaintiffs. However, plaintiffs were never permitted to examine the records, to answer the charges therein, or to examine the persons responsible for such charges. Indeed, plaintiffs were left to guess what they did to cause the visitation of the wrath of the defendants having been brought down upon them.

It is settled that an administrative agency cannot base its decision in adjudicatory proceedings upon facts gathered from its own files or from a secret investigation without giving the party aggrieved an opportunity to contest such information. See, Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304 (1937); West Ohio Gas Co. v. Public Utilities Com., 294 U.S. 63, 69 (1935); United States

v. Abilene & S.R. Co., 265 U.S. 274, 288 (1924). If the District Court considered the so-called "administrative records" in granting defendants' motion for summary judgment, then it fell into the same error as the defendants themselves. If the court below did not consider the record, then there is nothing of any consequence whatever which would support the granting of defendants' motion. The court below either was impressed by the data presented to it by defendants and concluded that defendants' action was justified, or it did not consider such data at all. Whichever process the court followed, however, it should not have entered summary judgment in defendants' favor. Rather, since the data filed by plaintiffs clearly demonstrated the lack of due process on the part of defendants in reaching their decision to order debarment, the court below should have ordered summary judgment for plaintiffs.

IV

WHATEVER MAY HAVE BEEN SHOWN CONCERNING THE OTHER DEFENDANTS, THERE IS NO SUPPORT FOR THE DEBARMENT OF CARMEN GONZALEZ

The action of defendant Freeman on July 5, 1962, confirming the debarment of the plaintiffs,while unjust,is particulary so in respect to Carmen Gonzalez. The most that can be said concerning this plaintiff is that she was the secretary of the Thos. P. Gonzalez Corporation for some time prior to the filing of this action and that she is the sister of the plaintiff Thomas P. Gonzalez.

None of the material relied upon by defendants in any manner implicates Carmen Gonzalez. The information to which Thomas P. Gonzalez pleaded guilty named him and him alone as the defendant.

Surely the defendants here may not urge that his conviction caused a corruption of blood which affected Carmen Gonzalez.[3] Such a concept was discredited by the Constitution and by Common Law. Yet, it is this concept alone which could provide any basis for the debarment of Carmen Gonzalez.

CONCLUSION

For the foregoing reasons, appellants submit that the order and judgment of the District Court should be reversed, and that this court should remand the case with instructions to enter judgment for the appellants.

Respectfully submitted

SHELDON E. BERNSTEIN

ALAN H. KAPLAN

PAUL H. MANNES

1725 Eye Street, N. W.
Washington 6, D. C.

Attorneys for Appellants.

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[3] See, Heirs of Szywauski v. Zunts, 20 F. 361-2 (E.D. La., 1884); 1 Chitty Criminal Law 723; 2 Kent, Commentaries *386.

INDEX

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CARMEN GONZALEZ
740 South Gramercy Place
Los Angeles, California

THOMAS P. GONZALEZ
8 Toluca Estate Drive
North Hollywood, California

THOS. P. GONZALEZ CORPORATION,
a California corporation,
1960 South Santa Fe Avenue
Los Angeles, California,

Plaintiffs,

vs.

Civil Action No. 2922-62

ORVILLE L. FREEMAN, CHARLES S. MURPHY, HORACE D. GODFREY, JOHN A. BAKER, JOHN P. DUNCAN, JR., and WILLARD W. COCHRANE
All c/o Commodity Credit Corporation
Department of Agriculture
Mall between 12th and 14th Streets, S.W.
Washington, D. C.

COMMODITY CREDIT CORPORATION
a Body Corporate,
Mall between 12th and 14th Streets, S.W.
Washington, D. C.,

Defendants.

DOCKET ENTRIES

Date	Proceeding	
1962		
Sep. 12	Complaint, appearance	filed.
Sep. 12	Summons, copies (10) and copies (10) of Complaint issued #1,2,5,7,8 ser 9/14/62 Atty Gen ser 9/15/62, #3,4 & 6 NF 10/3/62	filed.

Date	Proceeding	
1962		
Sep. 12	Affidavit of Alan H. Kaplan, exhibits (7)	filed.
Sep. 12	Affidavit of Thomas P. Gonzalez	filed.
Sep. 12	Motion of Pltff. for preliminary injunction MC 9/20/62	filed.
Sep. 12	Memo. in support of Motion for Preliminary injunction	filed.
Sep. 20	Opposition of defts to pltfs' motion for preliminary injunction; exhibits A & B; c/m 9/20/62; appearance of David Acheson and Joseph Hannan.	filed.
Sep. 28	Memorandum of pltfs in response to defts opposition to pltfs motion for summary judgment; c/m 9/28/62.	filed.
Oct. 3	Proposed findings of fact; c/m 10/3/62.	filed.
Oct. 3	Findings of fact and conclusions of law.	Walsh, J.
Oct. 3	Order denying motion for preliminary mandatory injunction. (N)	Walsh, J.
Oct. 10	Notice of appeal by pltf from order 10/3/62. Copy to Joseph M. Hannon. Deposit by Bernstein $5.00.	filed.
Oct. 10	Cost bond on appeal by pltfs in sum of $250.00 with Peerless Insurance Co., approved.	filed.
Oct. 11	Order to transmit original file forthwith to U.S. Court of Appeals. (N) Micro 10/10/62	Walsh, J.
Oct. 12	Amended complaint, substituting John A. Baker in place of Frank J. Welch and dropping James T. Ralph; c/ser 10/11/62. (fiat)	Walsh, J.
Oct. 12	Summons, copy and copy of amended complaint to #4. Ser 10/16/62.	
Oct. 16	Record on appeal delivered to USCA. Deposit by Mannes $1.10.	
Oct. 16	Receipt from USCA for original papers.	filed.
Nov. 7	Motion of pltfs for summary judgment or in alternative for preliminary injunction; notice; P&A; statement; affidavit; exhibits H G G-2 & I. MC 11/7/62.	filed.
Nov. 16	Opposition of defts to pltfs statement of material facts; c/m 11/16/62.	filed.

Date	Proceeding	
1962		
Nov. 16	Motion of defts to dismiss and alternative cross-motion for summary judgment; exhibits A, B(1,2,3,4,5,6,7,8,9,10, 11, 12A, 12B, 13A, 13B and 14) D(A thru F); statement; P&A; c/m 11/16/62; MC 11/16/62.	filed.
Nov. 16	Opposition of defts to motion for summary judgment; c/m 11/16/62.	filed.
Nov. 23	Opposition by pltff. to defts motion to dismiss and cross motion for summary judgment, c/m 11-23-62.	filed.
Nov. 30	Motion by defts for protective order; P&A; c/m 11/30/62; MC 11/30/62.	filed.
Dec. 3	Opposition of pltfs to motion for a protective order; c/m 12/3/62.	filed.
Dec. 6	Reply of deft to opposition of pltf to motion for protective order; c/s 12/6/62.	filed.
Dec. 7	Motion for protective order under Rule 30(b) (Rep: Dorothy F. Sweet)	Walsh,J.
Dec. 19	Motion of pltfs to strike affidavits of Rulon Gibb and Ford M. Milan; c/m 12/18/62; P&A; MC 12/19/62.	filed.
Dec. 19	Order granting defts motion for protective order under Rule 30(b) FRCP; staying discovery pending disposition of defts motion to dismiss and cross-motion for summary judgment. (N)	Walsh,J.
Dec. 20	Certified copy of stipulation filed in the USCA dismissing the appeal without costs.	filed.
Dec. 21	Opposition by defts. to motion to strike affidavits of Rulon Gibb & Ford M. Milan, c/n 12-21-62.	filed.
1963		
Jan. 5	Statement of genuine issues of pltfs and reply to defts' statement of material facts; c/m 1/4/63.	filed.
Jan. 10	Motions of pltf for summary judgment or for preliminary injunction; of deft to dismiss and alternative cross-motion for summary judgment; and, of pltf to strike affidavits, argued and submitted. (Rep. Deeds)	Matthews,J.
Jan. 14	Supplement to motion of defts to dismiss and alternative cross-motion for summary judgment; c/m 1/14/63; exhibits E1 thru E8.	filed.

Date	Proceeding
1963	
Jan. 14	Supplemental memorandum of pltfs in opposition to motion to dismiss and in support of motion for summary judgment; c/m 1/14/62; affidavit. filed.
Feb. 1	Judgment denying motion of pltfs for summary judgment; granting motion of pltfs to strike specified affidavits; granting motion of defts for summary judgment; dismissing the action. (N) Matthews, J.
Feb. 26	Notice of appeal by pltfs on order of 2/1/63. Copy to US Attorney; deposit $5.00 by Kaplan. filed.

[Filed Oct. 12, 1962]

AMENDED COMPLAINT

(Injunction and Declaratory Judgment)

Plaintiffs, by their attorneys, respectfully represent to the Court, as follows:

1. This is an action for an injunction and declaratory relief, brought pursuant to the District of Columbia Code, Title 11-§§305-306 (1961 ed.), the Administrative Procedure Act, 5 U.S.C. §§ 1001-1009, and the Federal

Declaratory Judgments Act, 28 U.S.C. §§ 2201-2202. Jurisdiction is also provided by 15 U.S.C. § 714b(c). There is now existing between the parties an actual, justiciable controversy in respect to which plaintiffs need injunctive relief as well as a declaration of their rights by this Court.

(a). Plaintiffs, CARMEN GONZALEZ and THOMAS P. GONZALEZ, are residents of the State of California.

(b). Plaintiff, THOS. P. GONZALEZ CORPORATION, is a California corporation, with its principal place of business at 1960 South Santa Fe Avenue, Los Angeles, California.

2. Defendants, ORVILLE L. FREEMAN, CHARLES S. MURPHY, HORACE D. GODFREY. JOHN A. BAKER, JOHN P. DUNCAN JR. and WILLARD W. COCHRANE, are the Directors of the defendant, COMMODITY CREDIT CORPORATION, a body corporate, created by Act of Congress, and an agency and instrumentality of the United States. Defendant, ORVILLE L. FREEMAN, is the Chairman of the Board of Directors of the defendant-corporation, defendant, CHARLES S. MURPHY, is its President, and defendant, HORACE D. GODFREY, is its Executive Vice-President and Chief Executive Officer.

3. Plaintiffs are engaged in the business of importing and exporting agricultural commodities. Since 1951, the plaintiff, THOS. P. GONZALEZ CORPORATION, has purchased more than Seven Million ($7,000,000.00) Dollars worth of agricultural commodities from the COMMODITY CREDIT CORPORATION, trading in which has constituted a large part of the said plaintiff's business. These purchases from the COMMODITY CREDIT CORPORATION have been fully in accord with the basic purpose of the COMMODITY CREDIT CORPORATION which is "stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities . . . and of facilitating the orderly distribution of agricultural commodities." 15 U.S.C. § 714.

4. On January 13, 1960, plaintiff, THOS. P. GONZALEZ CORPORATION, without prior notice, hearings or findings, was notified by telegram

from one Walter C. Berger, then a Vice-President of the defendant-corporation, that the plaintiffs were "suspended from participating in any programs of the COMMODITY CREDIT CORPORATION pending the completion of an investigation . . ." For a time thereafter these plaintiffs attempted without success to obtain reinstatement. Thereafter an indictment (No. 29,825) was returned against THOMAS P. GONZALEZ individually in the United States District Court for the Southern District of California charging him with violating 15 U.S.C. 714 and 18 U.S.C. 1001. Thereafter the indictment was dismissed. On or about January 17, 1962, THOMAS P. GONZALEZ pleaded guilty to an information charging him with a violation of 7 U.S.C. § 1622(h), and a $100.00 fine was imposed and then suspended by the Court.

5. Thereafter plaintiffs, through their counsel, renewed their efforts to have the aforesaid suspension and debarment lifted.

(a). Commencing on February 27, 1962, plaintiffs' local counsel had numerous conferences with various representatives of the COMMODITY CREDIT CORPORATION for the purpose of obtaining reinstatement. Not only did the said officials of the COMMODITY CREDIT CORPORATION refuse to reinstate plaintiffs, but they also refused to state the reasons for the suspension or its continuance. On April 18, 1962, counsel for the plaintiffs wrote to Mr. Horace D. Godfrey, the Chief Executive Officer of the COMMODITY CREDIT CORPORATION summarizing the events surrounding the suspension and requesting that the suspension be lifted. On May 14, 1962, plaintiffs' attorneys were advised orally by one Wingate Underhill, of the COMMODITY CREDIT CORPORATION, that the suspension of THOMAS P. GONZALEZ and related companies would be continued until January 12, 1965.

(b). The matter was then promptly by letter appealed to the defendant, FREEMAN, who as Secretary of Agriculture is ex-officio Chairman of the Board of Directors of the COMMODITY CREDIT CORPORATION.

(c). On May 24, 1962, defendant, GODFREY, replied to the letter of April 18, 1962, stating:

"This is in reply to your letter of April 18, 1962, concerning the suspension of the Thos. P. Gonzalez Corporation, its officers and affiliates, from participating in any programs of Commodity Credit Corporation. After a thorough examination and consideration of all the facts surrounding our dealings with Mr. Thomas P. Gonzalez, the Thos. P. Gonzalez Corporation and affiliated companies, and the views set forth in your letter, a determination has been made to debar the Thos. P. Gonzalez Corporation, its officers and affiliates, from participating in any programs financed by Commodity Credit Corporation for a period of five years effective January 13, 1960. A copy of our notice to Mr. Thomas P. Gonzalez and the Thos. P. Gonzalez Corporation is enclosed for your information."

(d). On June 1, 1962, the plaintiffs' attorney again wrote the defendant, FREEMAN, protesting the suspension, which had been accomplished without notice to plaintiffs of the grounds relied upon as a basis for the suspension and without affording plaintiffs any opportunity for a hearing.

(e). Having received no response to the letters of May 17, 1962, and June 1, 1962, plaintiffs' attorney wrote the defendant, FREEMAN, on June 28, 1962, again requesting an explanation of the reasons for the prior action of the defendant, COMMODITY CREDIT CORPORATION.

(f). On July 5, 1962, a belated reply was received from the defendant, FREEMAN. The letter made no explanation of the secret proceedings conducted theretofore nor did it shed any additional light on the situation. In addition, the defendant, FREEMAN, refused to review the matter further or to entertain any further discussions or appeal.

6. All of the foregoing determinations by defendants, including the original suspension order, the order continuing the suspension until January 12, 1965, and the final cryptic advice of the Secretary of Agriculture that further discussions would serve no useful purpose, were arrived at without charges, formal or informal, without a hearing, and without even a shred of or lip service to the barest concepts of due process of law, although plaintiffs continuously and strenuously protested this secret, ex parte destruction of their rights and business.

Moreover, by the indicated abortive efforts and the wall of silence and finality with which they were met, plaintiffs have exhausted their administrative remedies.

7. Because of the arbitrary and illegal action on the part of the defendants and each of them, plaintiffs have been unable to secure their legal right to bid with, purchase from, and otherwise deal with the COMMODITY CREDIT CORPORATION, and plaintiffs have thus suffered substantial and irreparable damage for which there is no adequate remedy at law. Since other firms and individuals have been and will continue to be permitted to purchase agricultural commodities from the defendant, COMMODITY CREDIT CORPORATION, during the period in which plaintiffs have been and will continue to be illegally suspended from trading with the COMMODITY CREDIT CORPORATION, the action of defendants has been and is grossly and arbitrarily discriminatory and a denial of plaintiffs' rights to due process of law. Further, such discrimination is unauthorized by any valid law, statute, rule or regulation of the United States presently in force and effect. Plaintiffs are now and have been entitled to participate in any and all programs of the COMMODITY CREDIT CORPORATION, although they are presently being illegally prevented from so participating.

8. The action of the COMMODITY CREDIT CORPORATION was realistically penal in character, was done without regard for due process, and was accomplished without authority in law, and is, therefore, null and void.

WHEREFORE, plaintiffs pray, as follows:

1. For a declaratory judgment that plaintiffs are eligible to participate in any and all programs of the COMMODITY CREDIT CORPORATION.

2. For a declaratory judgment that the suspension effected May 24, 1962 and finally affirmed July 5, 1962, was unauthorized by law, illegal, and of no force and effect.

3. For an injunction to compel the defendants, ORVILLE L. FREEMAN, CHARLES S. MURPHY, HORACE D. GODFREY, JOHN P. DUNCAN, JR., JOHN A. BAKER, and WILLARD W. COCHRANE, to cease from continuing in effect the purported suspension and debarment of the plaintiffs, or any of them, from participation in any and all programs of the COMMODITY CREDIT CORPORATION and to cancel and annul all notices of suspension heretofore served on plaintiffs or any of them.

4. For such other and further relief as may be just and proper.

CARMEN GONZALEZ, THOMAS P. GONZALEZ, and THOS. P. GONZALEZ CORPORATION

By /s/ Sheldon E. Bernstein

By /s/ Alan H. Kaplan

* * *

Attorneys for Plaintiffs

Of Counsel:
BERNSTEIN, KLEINFELD & ALPER
* * *

DISTRICT OF COLUMBIA, SS:

I, ALAN H. KAPLAN, being first duly sworn on oath, according to law, do hereby depose and say that I have read the foregoing Amended Complaint by me subscribed, and that the facts stated therein are true to the best of my knowledge and belief.

/s/ Alan H. Kaplan

Subscribed and sworn to before me this day of October, 1962.

/s/
Notary Public, D. C.

[Certificate of Service]

[Filed Nov. 7, 1962]

MOTION FOR SUMMARY JUDGMENT, OR
IN THE ALTERNATIVE, FOR
A PRELIMINARY INJUNCTION

Come now the plaintiffs, by their attorneys, and move this Honorable Court to enter summary judgment for the plaintiffs, in accordance with the provisions of Rule 56(b) and (c) of the Federal Rules of Civil Procedure, on the grounds that the pleadings, including the verified amended complaint, the original motion for a preliminary injunction and exhibits and affidavits annexed thereto, and the additional affidavit annexed hereto, show that the plaintiffs are entitled to summary judgment as a matter of law, as there is no genuine issue of material fact, and for reasons in support refer the Court to the Memorandum of Points and Authorities, attached hereto and made a part hereof.

And if plaintiffs' motion for summary judgment be denied, plaintiffs then move in the alternative for a preliminary injunction in this cause enjoining the defendants Orville L. Freeman, Charles S. Murphy, Horace D. Godfrey, John A. Baker, John P. Duncan, Jr., and Willard W. Cochrane, their agents, servants, and employees from continuing in effect the suspension and debarment of the plaintiffs or any of them, which suspension and debarment prohibits plaintiffs from participating in any programs financed by the Commodity Credit Corporation, and for reasons in support refer the Court to the attached affidavit, the motion for preliminary injunction (previously filed herein) and annexed exhibits, affidavit and memorandum, and the verified amended complaint, all of which pleadings plaintiffs incorporate herein by reference as though fully set out in haec verba.

Respectfully submitted,
BERNSTEIN, KLEINFELD & ALPER
By /s/ Sheldon E. Bernstein
By /s/ Alan H. Kaplan
By /s/ Paul H. Mannes
* * *
Attorneys for Plaintiffs

[Certificate of Service]

[Filed Nov. 7, 1962]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. On January 13, 1960, by order of Walter C. Berger, Vice President of the Commodity Credit Corporation, the Thos. P. Gonzalez Corporation, its officers and affiliates were summarily suspended from participation in any programs of the Commodity Credit Corporation pending the completion of an investigation regarding the alleged misuse of certificates issued by the Commodity Credit Corporation.

2. On October 31, 1960, Andrew J. Mair, Vice President of the Commodity Credit Corporation wrote to Thomas P. Gonzalez and advised him that the suspension would be continued in effect until the Department of Justice had concluded its determination and action in the matter.

3. The action of the Department of Justice was concluded on or about January 17, 1962, when Thomas P. Gonzalez pleaded guilty to an information charging him with a violation of 7 U.S.C. 1622(h) that is, making certain false statements to the Bank of America. The United States District Court for the Southern District of California imposed and then suspended a sentence of a $200.00 fine.

4. Subsequent to January 17, 1962, plaintiffs through their counsel, attempted to have the suspension terminated, and in furtherance of this effort counsel made several personal visits to, made several calls to, and wrote letters to various defendants, and their agents, servants, and employees. One such letter is annexed as Exhibit "A" to the affidavit of Alan H. Kaplan annexed to the motion for a preliminary injunction filed herein.

5. In the period from February to May, 1962, plaintiffs' counsel were informed by various officials of the Commodity Credit Corporation that consideration was being given to the ultimate disposition of the matter.

6. By a letter dated May 24, 1962, from defendant Horace D. Godfrey, Executive Vice President of the Commodity Credit Corporation, plaintiffs' counsel were advised that a determination had been made to debar the Thos. P. Gonzalez Corporation, its officers and affiliates (including plaintiff Carmen Gonzalez) from participating in any programs financed by the Commodity Credit Corporation for a period of five years effective January 13, 1960. A similar notice was sent to Thomas P. Gonzalez. Previously, on May 15, 1962, plaintiffs' counsel had received informal notice of this determination.

7. On May 17, 1962, plaintiffs duly protected the imposition of such a suspension to the defendant Freeman, the Secretary of the Department of Agriculture. There being no response to this protest, counsel again wrote on June 1, 1962, and June 28, 1962, to the defendant Freeman. Copies of these letters are attached as Exhibits "B", "D", and "E" to the affidavit of Alan H. Kaplan, annexed to the motion for a preliminary injunction filed herein.

8. On or about July 6, 1962, plaintiffs' counsel were advised by letter from the defendant Freeman that the action taken under date of May 24, 1962, was wholly and finally affirmed.

9. There is no further right to review within either the Commodity Credit Corporation or the Department of Agriculture, and the action of the defendant Freeman is final.

10. At no time have plaintiffs been notified by the defendants, their agents, servants or employees, or the Department of Agriculture as to the grounds relied upon as a basis for the debarment or suspension, nor have plaintiffs been afforded the opportunity to answer allegations which may have been the basis for the disciplinary action of the defendants.

11. From 1951 through 1959, the Thos. P. Gonzalez Corporation had purchased over $7,000,000.00 worth of surplus agricultural commodities for export from the Commodity Credit Corporation. In that period the Thos. P. Gonzalez Corporation made a net profit on the resale of these commodities in the amount of $350,000.00.

12. Since January 13, 1960, the Thos. P. Gonzalez Corporation has been ineligible to purchase surplus agricultural commodities from the Commodity Credit Corporation. Because of this ineligibility, plaintiffs' business has sustained irreparable injury.

13. There is no law or regulation which expressly permits or authorizes defendants to issue a debarment order suspending plaintiffs from participating in programs financed by the Commodity Credit Corporation.

14. Since January 13, 1960, plaintiffs have suffered monetary loss because of their suspension from participation in programs financed by the Commodity Credit Corporation, and plaintiffs' loss will continue so long as the suspension remains in effect.

Respectfully submitted,

BERNSTEIN, KLEINFELD & ALPER

By /s/ Alan H. Kaplan

* * *

Attorneys for Plaintiffs

[Filed Sept. 12, 1962]

AFFIDAVIT OF THOMAS P. GONZALEZ

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss:

I, THOMAS P. GONZALEZ, first being duly sworn, depose and say:

1. I am President ~~and the principal stockholder~~ of the Thomas P. Gonzalez Corporation of Los Angeles, California, one of the plaintiffs in the above-entitled action, whose business consists in large measure of the export and import of various agricultural commodities. Either through Thomas P. Gonzales Corporation or otherwise, I have been engaged in such business in Los Angeles, California, for more than twenty-five years.

2. For the past eleven years, approximately 30% of my business has involved participation in Commodity Credit Corporation programs, involving purchase from that Agency of agricultural commodities intended primarily for foreign export.

3. Utilizing the Commodity Credit Corporation, the Federal Government seeks to sustain trade and prices in various agricultural commodities. Through these programs the Commodity Credit Corporation has become a principal buyer of many agricultural commodities produced in this country. Depending upon market conditions, these commodities are offered for resale by the Commodity Credit Corporation to private individuals and firms, generally at prices substantially below prevailing market prices, on condition that the commodities thus sold be exported from the United States to particular foreign nations within a specified period of time. Because of price differentials frequently existing between agricultural commodities available from the Commodity Credit Corporation and those available on the open market, any person or firm desiring to engage in the business of exporting such commodities for foreign use and consumption necessarily must have available those commodities being offered by the Commodity Credit Corporation;

otherwise, such persons would be saddled with a gross competitive disadvantage in making export sales, because they would be required to make their purchases in the open market at prevailing supported prices rather than purchasing from Commodity Credit Corporation at prices substantially lower than open market prices.

4. From 1951 through 1959, the purchases of the Thomas P. Gonzalez Corporation and related companies from the Commodity Credit Corporation of commodities intended for export under the aforesaid programs have totaled more than $7,000,000. No purchases have been permitted to be made since January 13, 1960, when, as stated in the complaint herein, a suspension order was issued by the Commodity Credit Corporation affecting the affiant, the Thomas P. Gonzalez Corporation and affiliated companies. The net profit on those transactions by the various related entities over the aforesaid nine-year period was approximately $350,000.00. In other words, prior to the indicated suspension, affiant, the Thomas P. Gonzalez Corporation and related companies, purchased approximately $1,000,000 per year of commodities from Commodity Credit Corporation on which they made an average net profit upon resale for foreign export of $40,000.00 per year.

5. Since the aforesaid suspension of January 13, 1960, to date, I estimate the loss of the Thomas P. Gonzalez Corporation and related companies as a result of the aforesaid debarment to be in the sum of approximately $100,000.00. If the debarment should continue in force, the companies will sustain an average annual approximate loss of $50,000.00.

6. At all times since January 13, 1960, I have been ready, willing, and able to post a performance bond with the Commodity Credit Corporation for any reasonable sum to guarantee the performance of any and all contractural obligations with the Commodity Credit Corporation. I remain ready, willing, and able to post said bond.

/s/ Thomas P. Gonzalez

[JURAT the 10th day of September, 1962.]

[Filed Sept. 12, 1962]

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

ALAN H. KAPLAN, first being duly sworn, upon his oath, deposes and says:

1. I am a member of the Bar of this Court, practicing law in association with the firm of Bernstein, Kleinfeld & Alper, 1725 Eye Street, N. W., Washington, D. C.

2. During the past two years, in association with Sheldon E. Bernstein, Esquire, I have performed legal services on behalf of THOMAS P. GONZALEZ and the other plaintiffs herein with the objective of seeking a termination of the suspension of the THOS. P. GONZALEZ CORPORATION and other plaintiffs from participating in any programs of the Commodity Credit Corporation.

3. Commencing February 27, 1962, I participated in a new series of conferences with various representatives of the Commodity Credit Corporation with the abovementioned objective.

4. Notwithstanding repeated oral and written inquiries and requests, the Commodity Credit Corporation officials have refused and failed to state the basis, if any, for the suspension. One such inquiry was made in a letter of April 18, 1962, addressed to Mr. Horace Godfrey, its Chief Executive Officer, a copy of which is attached hereto as Exhibit A.

5. On May 14, 1962, the undersigned was informed by Mr. Wingate Underhill, of the Commodity Stabilization Service of the Commodity Credit Corporation, based upon factual considerations which have never been made known to the undersigned or the plaintiffs, that the suspension of the THOS. P. GONZALEZ CORPORATION, its officers, THOMAS P. GONZALEZ and CARMEN GONZALEZ, and related companies would be continued until January 12, 1965.

6. Upon the foregoing information, under date of May 17, 1962, we wrote a letter to the Secretary of Agriculture, the ex officio Chairman of the Board of Directors of the Commodity Credit Corporation, formally

protesting such summary suspension and indicating that it had been ordered without any opportunity whatever having been given Mr. Gonzalez and the other plaintiffs to be informed of the bases relied upon for the suspension, or to be accorded any hearing relating to said suspension. A copy of this letter is attached hereto as Exhibit B.

7. Subsequently, under date of May 24, 1962, a formal notice was received that a debarment of THOMAS P. GONZALEZ, the THOS. P. GONZALEZ CORPORATION, and related companies would be continued for a period of five years from January 13, 1960, a copy of which notice is attached as Exhibit C, and its inclosure, attached hereto as Exhibit C-2.

8. No response having been received to the May 17, 1962 communication, accordingly, on June 1, 1962, a follow-up letter was sent to Secretary Freeman, a copy of which is attached as Exhibit D.

9. Subsequently, when on June 28, no reply was yet forthcoming from the Secretary of Agriculture, a second follow-up letter was written, a copy of which is attached as Exhibit E.

10. Finally, under date of July 5, 1962, a letter replying to ours of May 17, was received from the Secretary of Agriculture stating that the debarment had been taken after a thorough examination and consideration of the facts surrounding Commodity Credit Corporation's dealings with THOMAS P. GONZALEZ, the THOS. P. GONZALEZ CORPORATION, and affiliated companies, and that further discussions would serve no useful purpose in the absence of new facts, a copy of which is attached as Exhibit F.

There being no "new facts," especially in regard to CARMEN GONZALEZ whom the Secretary did not even mention, your affiant respectfully submits that there is no other recourse or remedy except to pray for the relief of this Court.

/s/ Alan H. Kaplan

[JURAT the 30th day of August, 1962.]

EXHIBIT "A"
[Attachment to Kaplan Affidavit]

April 18, 1962

Mr. Horace Godfrey
Executive Vice-President
Commodity Credit Corporation
Department of Agriculture
Washington 25, D. C.

Re: Thos. P. Gonzalez Corporation,
its officers and affiliates

Dear Mr. Godfrey:

This is with further reference to the suspension of the above corporation, its officers and affiliates from dealings with the Commodity Credit Corporation. Previously, we have conferred with various officials of the agency and most recently, Mr. Underhill.

Because of the imminence of decision on this suspension matter, it may be best if we briefly summarize our views so that they may be considered by the Commodity Credit Corporation in reaching a decision.

Briefly, the facts are that on January 13, 1960, Mr. Walter C. Berger, then Vice-President of Commodity Credit Corporation, telegraphed my client, suspending it, its officers and affiliates, "from participating in any program of the Commodity Credit Corporation pending the completion of an investigation" concerning possible misuse of certain sanitary certificates issued by a field officer of CCC. It has been suggested by various officers of your agency that prior to this 1960 suspension, the CCC had encountered certain difficulties with my client. Whatever the merits of these alleged prior difficulties, they were not, apparently, of such proportions as to require any comparable disciplinary proceedings because in fact no unequivocal suspension had previously been effected against my client.

Pending the investigation by your agency and the Department of Justice of the matters covered by the telegram, we conferred with certain of your officials with regard to reinstatement but did not pursue the matter in the face of what then appeared to be the agency's legitimate position that no action could be taken until the results of the investigation had been reviewed. Thereafter, the investigation was completed and it eventuated in the filing of a criminal information in the United States District Court for the Southern District of California against Thomas P. Gonzalez individually. On January 16, 1962, Mr. Gonzalez pleaded guilty to the information and was sentenced in the form of a fine.

Thereafter, in February, 1962, we commenced efforts to have our client reinstated with CCC. As you know, this matter is still under consideration by your agency.

It is our position: (1) that as a matter of inherent fairness no further continuing suspension is in order, and; (2) that, in any event, even assuming, arguendo, that some form of suspension is still within the discretion of the agency, nevertheless, the suspension already visited upon our client, which punishment has now persisted for more than two years, is in and of itself beyond the scope of appropriate punishment commensurate with the nature of the offense involved.

With respect to our first point, I strongly urge that the constitutionally recognized concept against double jeopardy is so vital a facet of our processes of government, that whether legally applicable or not to administrative resolution, it morally behooves the Federal Government, in considering its administrative action, not to impose sanctions for the same offense on account of which judicial sanctions have previously been imposed.

It is, I suggest, basic to our philosophy that when a man charged with an offense has paid his price to society through regular judicial processes that thereafter he has a clean bill of health and can return to his normal place in society without suffering further disability. Indeed, were this not so it would be better for all punishment to be interminable and for persons convicted of offenses to be confined forever, for there would be no place for them to return into the social stream.

It has been suggested that the present consideration of the agency involve difficulties attributed to our client different than that for which he was recently prosecuted. However, whatever the independent merits of those other alleged difficulties, it is

obvious that they previously were not considered of such moment as to require a flat suspension. Also, it is obvious that since our client has had no dealings with the Commodity Credit Corporation since this suspension was initiated on January 13, 1960, nothing further could have subsequently occurred which would give added substance to any determination to suspend.

Even assuming, however, that the agency is of the view that it it can properly consider a continuing suspension now, and in that consideration take into account that for which our client has already paid, nevertheless, we suggest that the suspension which has been in effect for over two years and under which our client has suffered immeasurably, is punishment substantially beyond what would appear to be in order for the nature of the offense involved. I am certain that you appreciate that our client has been engaged in his business for more than a quarter of a century, that this is the only business he knows and is a business from which he and his many employees derive their livelihood. Also a substantial part of his business has involved commodities of the type under the control of your agency. Any suspension, therefore, for no matter how short a period imposes a severe financial penalty. Obviously, any suspension that has continued to persist for more than two years has already imposed an inordinate penalty.

For the indicated reasons, I strongly submit that the suspension initiated by the telegram of January 13, 1960, should forthwith be terminated and our client thereafter permitted to trade with your agency as before. In closing, I should suggest that were the agency to conclude that its security in such dealings require some reasonable conditions, such as a bond, we would not be adverse to recommending agreement with same provided that the conditions are not so onerous as in effect to preclude my client's conduct of his business.

Accordingly, we respectfully urge that action be taken by your agency forthwith to terminate the suspension.

Very truly yours,

Sheldon E. Bernstein

SEB:ji

Enclosure

EXHIBIT "B"
[Attachment to Kaplan Affidavit]

Law Offices
BERNSTEIN, KLEINFELD & ALPER

* * * May 17, 1962 * * *

Honorable Orville L. Freeman
The Secretary
Department of Agriculture
Washington 25, D. C.

RE: Commodity Credit Corporation Suspension
Thomas P. Gonzalez, et al.

Dear Mr. Secretary:

Contrary to what most of us were taught in our formative years as to built-in safeguards in our constitutional system to avoid such a result, it can in fact happen here. Indeed, the history of the handling of the matter about which I am writing, involving the Commodity Credit Corporation, demonstrates that unless corrective action is taken it will have happened here.

Briefly, the situation here is that on January 13, 1960, our client, Thomas P. Gonzalez, was telegraphed by Walter C. Berger, at that time a Vice President of the Commodity Credit Corporation, that "effective immediately the Thomas P. Gonzalez Corporation, its officers and affiliates are suspended from participating in any programs of the Commodity Credit Corporation pending the completion of an investigation regarding the misuse of certificates issued" by a local office of the Commodity Credit Corporation. Thereafter, after thorough investigation by your Department and the Department of Justice, an indictment was returned in the Southern District of California charging my client with misuse of the certificates in question. Then, in January, 1962, by agreement of the Department of Justice, the indictment was dismissed and an information returned charging my client with a misdemeanor in the misuse of these certificates. My client pleaded guilty to that information on January 16, 1962, at which time he was sentenced by the Court to pay a fine. This, of course, under normally accepted procedures, should have been presumed to have closed the case.

Thereafter, acting on behalf of the client, we had a series of conferences with various echelons of command at the Commodity Credit Corporation for the purpose of seeking our client's reinstatement. Our position in respect to this was summarized in our letter of April 18, 1962, a copy of which is enclosed. We have now been orally informed by Mr. Underhill, of the Commodity Credit Corporation, that an order will shortly issue which not only will bar our client and his corporations from further business with the Commodity Credit Corporation until 1965 but, for some unaccountable reason, the order will extend to persons who bore no relation whatsoever to the alleged offense earlier described.

Now, Mr. Secretary, while this letter may appear to have opened melodramatically, in fact when you stop to consider the situation, the end result and the modus operandi by which it is being achieved violate every principle of fair play and due process supposedly built into our system to avoid what has transpired in other quarters of the globe. No matter what justification may be asserted, in fact what has occurred here is:

1. A determination, depriving a man of a large part of the substance of his living, has been made by an executive agency of the Government acting in camera.

2. That determination has been effected without any confrontation of the accused either by the witnesses against him, the evidence against him, or even the charges upon which action has been taken.

3. That action has been taken without giving the accused any hearing whatsoever nor even informing him of the specific allegations upon which action is predicated so that an informed answer to those allegations could be advanced.

4. That action has been taken apparently in part, if not in large part, on the basis of an alleged wrong done by the accused for which he has already been duly prosecuted and punished by the judicial branch of our Government so that the additional punishment imposed by executive fiat in fact, if not in law, constitutes double jeopardy.

Apart from the gross departure from what we have always been led to understand as fair play and due process under our system of government, I suggest that it is presumptuous for a federal agency to impose sanctions over and above those finally determined to be appropriate by judicial authority. The officials of Commodity Credit Corporation may suggest, as they have intimated to the undersigned, that their action is not wholly based upon my client's conduct for which he has already been prosecuted, but in addition

upon other undesignated difficulties they have encountered with him. If so, it would seem strange that those other difficulties did not, prior to the current suspension, constitute sufficient cause for a suspension in and of themselves. And in these circumstances it is hardly fitting that they can now form the basis of a suspension unless you add onto the scales an offense for which my client has already been prosecuted and punished by the regular courts of the United States.

No matter what may be said to attempt to justify the action of Commodity Credit Corporation in this case, Mr. Secretary, you might wish to refer to a very apt expression by the late Mr. Justice Jackson in the so-called Texas City Disaster Case (Dalehite v. United States, 346 U.S. 15 at p. 50) where, in describing the Government's position, Mr. Justice Jackson said that the Government "can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest."

I can visualize that if, as, and when it becomes necessary to seek judicial relief from this wholly "undue process" action of Commodity Credit Corporation, counsel for the Government may argue that the action taken is committed to the sole "discretion" of the executive and that the matter is, therefore, not subject to judicial review. To this I would inquire whether executive discretion permits secret orders depriving a person of his livelihood, or a large part of his livelihood, without hearing, without a statement of the charges against him, without confronting him with witnesses or evidence and based in part, if not in large part, upon an action which has already been finally disposed of before the regular courts of the United States.

Mr. Secretary, if that is the type of discretion to be permitted the executive without any review or judicial inquiry, then our basic institutions have been subjected to an insidious and destructive executive usurpation of what all of us have always understood to be basic facets of our democratic processes of government. For if the livelihood of any person in this country is at the secret unilateral mercy of the executive, then I suggest to you that this is an horrendous departure from what we have conceived to be the democratic manner of doing things in this country. Indeed it raises a serious question as to why we fight abroad for what we are apparently losing here at home.

May I assume, Mr. Secretary, that you will have this matter looked into promptly so that I can assure my client his rights are being recognized.

Respectfully yours,

/s/ Sheldon E. Bernstein

SEB:ji
Enclosure

EXHIBIT "C"
[Attachment to Kaplan Affidavit]

UNITED STATES DEPARTMENT OF AGRICULTURE
COMMODITY CREDIT CORPORATION
WASHINGTON 25, D. C.

May 24, 1962

Bernstein, Kleinfeld & Alper
Attorneys at Law
Premier Building
1725 Eye Street, N. W.
Washington 6, D. C.

Dear Mr. Bernstein:

This is in reply to your letter of April 18, 1962, concerning the suspension of the Thos. P. Gonzalez Corporation, its officers and affiliates, from participating in any programs of Commodity Credit Corporation. After a thorough examination and consideration of all the facts surrounding our dealings with Mr. Thomas P. Gonzalez, the Thos. P. Gonzalez Corporation and affiliated companies, and the views set forth in your letter, a determination has been made to debar the Thos. P. Gonzalez Corporation, its officers and affiliates, from participating in any programs financed by Commodity Credit Corporation for a period of five years effective January 13, 1960. A copy of our notice to Mr. Thomas P. Gonzalez and the Thos. P. Gonzalez Corporation is enclosed for your information.

Sincerely yours,

/s/ H. D. Godfrey
Executive Vice President

Enclosure

EXHIBIT "C-2"
[Attachment to Kaplan Affidavit]

May 24, 1962

CERTIFIED MAIL - RETURN RECEIPT

Mr. Thomas P. Gonzalez
Thos. P. Gonzalez Corporation
1960 South Santa Fe Avenue
Los Angeles 21, California

Dear Mr. Gonzalez:

This is to notify you that after a thorough examination and consideration of the facts surrounding our dealings with you, the Thos. P. Gonzalez Corporation, and affiliated companies, and the views presented by your attorneys, Bernstein, Kleinfeld & Alper, in a letter dated April 18, 1962, the Thos. P. Gonzalez Corporation, its officers, Thomas P. Gonzalez and Carmen Gonzalez, and any firms in which Thomas P. Gonzalez and Carmen Gonzalez may be a partner or officer, and Gonzalez and Blanco, J. F. Gonzalez and Company and the American Chili Powder Company, in which Thomas P. Gonzalez has a proprietorship, have been debarred from participating in any programs financed by Commodity Credit Corporation for a period of five years. This debarrment is effective as of January 13, 1960, the date on which the above-named firms were suspended from participating in any programs of Commodity Credit Corporation.

Sincerely yours,

/s/ H. D. Godfrey
Executive Vice President

cc:
Bernstein, Kleinfeld & Alper
Attorneys at Law
Premier Building
1725 Eye Street, N. W.
Washington 6, D. C.

EXHIBIT "D"
[Attachment to Kaplan Affidavit]

Law Offices

BERNSTEIN, KLEINFELD & ALPER

* * * * * *

June 1, 1962

Honorable Orville L. Freeman
The Secretary
Department of Agriculture
Washington 25, D. C.

Re: Commodity Credit Corporation Suspension
Thomas P. Gonzalez, et al.

Dear Mr. Secretary:

Please refer to my letter to you of May 17th concerning the above subject, copy of which is enclosed, to which I have not yet had an answer.

Needless to say, the imposition of this continuing suspension on my client is a tremendous financial penalty and, therefore, I would anticipate that charges by me that the Commodity Credit Corporation has acted unfairly and wholly out of accord with our traditional due process concepts would either result in a prompt denial or, alternatively, equally prompt remedial action.

Accordingly, may I anticipate your early reply to the foregoing.

Respectfully yours,

/s/ Sheldon E. Bernstein

SEG:ji
Enclosure (1)

EXHIBIT "E"
[Attachment to Kaplan Affidavit]

June 28, 1962

Honorable Orville L. Freeman
The Secretary
Department of Agriculture
Washington 25, D. C.

Re: Commodity Credit Corporation Suspension
- Thomas P. Gonzalez, et al

Dear Mr. Secretary:

Please refer to my original letter to you dated May 17 on the above subject and my follow-up letter dated June 1.

Since writing to you on both of the above dates and not having received even an acknowledgement, telephone inquiry was made to your office on June 15. After being shuttled about, we were finally advised by Mr. Maxwell Johnson, of Commodity Credit Corporation, that no response had been made to my letter of May 17 because it had been mislaid, but that a response was then in the course of preparation and should be received by me no later than June 22. Not having received a response by June 26, I called Mr. Johnson and was advised that I would receive a reply within a few days.

In view of the foregoing circumstances, it appears that little reliance can be placed upon assurances from your subordinates as to when an answer may be received. Based upon 24 years of practice, including a number of years in the Department of Justice, it is inconceivable to me that a subject matter of such a serious nature could be handled in such a cavalier fashion by the officials of your Department whose duties as public servants should certainly require at least a modicum of courtesy.

At this juncture, it is my opinion that, either through ignorance or otherwise, your subordinates do not appreciate the seriousness of the subject matter, and therefore it has not been called to the attention of the highest echelons. I completely fail to comprehend how your subordinates are permitted, in camera and without explanation, so substantially to impair a business as they have done with the Gonzalez enterprises, and then have the effrontery to assume that they are wholly without obligation to make explanation when a legitimate protest is advanced in writing.

If any officials in your Department are laboring under the impression that either my client or I intend to stand still in the face of such circumstances, they are mistaken. In view of the apparent complete indifference of the Department, I shall not hesitate to utilize every conceivable resource to demonstrate the complete lack of responsibility evidenced in this matter. Accordingly, unless by Monday, July 2, 1962, I have received a reply to my letter of May 17 which is fully responsive to that letter in all of its parts, I shall take immediate steps to bring this matter to the attention of persons in legislative or executive authority who, I believe, will be interested in such a matter and, in addition, take such other steps as would appear to be appropriate in the premises.

Very truly yours,

Sheldon E. Bernstein

SEB:og

EXHIBIT "F"
[Attachment to Kaplan Affidavit]

DEPARTMENT OF AGRICULTURE

WASHINGTON 25, D. C.

July 5, 1962

Bernstein, Kleinfeld and Alper
Attorneys at Law
Premier Building
1725 Eye Street, N. W.
Washington 6, D. C.

Dear Mr. Bernstein:

This is in reply to your letter of June 1, 1962, which makes reference to your letter of May 17, 1962. As you were informed in a letter dated May 24, 1962, signed by H. D. Godfrey, Executive Vice President, Commodity Credit Corporation, the Thos. P. Gonzalez Corporation, its officers and affiliates, have been debarred from participating in any programs financed by Commodity Credit Corporation for a period of five years effective January 13, 1960. A copy of Mr. Godfrey's notice to Mr. Thomas P. Gonzalez and the Thos. P. Gonzalez Corporation dated May 24, 1962, was enclosed with the above-mentioned letter addressed to you. This debarment was made effective as of January 13, 1960, the date on which the Thos. P. Gonzalez Corporation, its officers and affiliates, were suspended from participating in any programs of Commodity Credit Corporation. As you were advised, the debarment action was taken after a thorough examination and consideration of the facts surrounding Commodity Credit Corporation's dealings with Mr. Thomas P. Gonzalez, the Thos. P. Gonzalez Corporation and affiliated companies.

This matter has been discussed with you on several occasions. The action which we have taken was reviewed by the Office of the General Counsel of the Department of Agriculture before action was taken. We feel that further discussions would serve no useful purpose unless you are in a position to present new facts concerning this matter which heretofore have not been considered.

Sincerely yours,

/s/ Orville L. Freeman
Secretary

[Filed November 7, 1962]

AFFIDAVIT

DISTRICT OF COLUMBIA) ss:

ALAN H. KAPLAN, being first duly sworn, upon his oath deposes and says:

1. I am making this affidavit to supplement another affidavit in this file bearing date of August 30, 1962.

2. Attached hereto as Exhibits "G", "H" and "I" are the following documents taken from my file:

Copy of telegram from Thomas P. Gonzalez Corporation to Walter C. Berger, dated January 15, 1959.

Copy of letter from Thomas P. Gonzalez to Wingate Underhill, dated October 20, 1960.

Copy of letter from Andrew J. Mair to Thomas P. Gonzalez dated October 31, 1960.

Copy of information in the case of United States of America v. Thomas P. Gonzalez, Criminal No. 30413 CD, filed in the United States District Court for the Southern District of California.

/s/ Alan H. Kaplan

Subscribed and sworn to before me this day of November, 1962.

/s/
Notary Public, D. C. (SEAL)

EXHIBIT "G"
[Attachment to Kaplan Supplemental Affidavit]

THOS. P. GONZALEZ CORPORATION
IMPORTERS & EXPORTERS
* * *

October 20, 1960

Mr. Wingate Underhill
Assistant Deputy Administrator
Commodity Stabilization Service
Commodity Credit Corporation
United States Department of Agriculture
Washington 25, D. C.

Dear Mr. Underhill:

We refer to Mr. William C. Berger's telegram of January 13th informing us that this Corporation would be suspended from participating in in the Commodity Credit Corporation program pending a conclusion in the investigation of an export transaction in Beans to Brazil.

We take the liberty to suggest that, in our opinion, sufficient time has now elapsed, more than nine months, to allow for reinstatement of this Corporation so as to again allow for participation in business with the Commodity Credit Corporation. This is more so in view of our past good record and also since the investigation has shown no misdoings in our part in connection with Anasae International Corporation, 80 Wall Street, New York City, sale of beans which they exported to Brazil on the ss "Mermacgulf" in September/October of 1959.

It is our opinion that this matter has now been reduced to a civil action between the parties concerned, which would relieve us of responsibility since we had no part in the export transaction, nor any connection with Anasae International Corporation.

We respectfully urge that you consider all the facts and make arrangements for immediate reinstatement. We may mention that the suspension from participation in the various Commodity

Credit Corporation programs since the above telegram of January 13th has already caused us losses of over $100,000.00 since we have had to export millions of pounds of grains, etc. purchased at market prices without the benefit of subsidies as granted to our competitors. There have been instances where we have had to place our requirements outside of United States in order to meet our commitments.

We do believe that this must be considered sufficient penalty already sustained for having been an innocent supplier to an unscrupulous New York exporter.

To further show our good faith we would be willing to post with the Commodity Credit Corporation a fifty thousand dollar performance bond guaranteeing compliance with any future contract that we may enter into with the Commodity Credit Corporation.

We are ready to establish this bond immediately and would greatly appreciate anything you may be able to do in our behalf to have our Corporation reinstated.

Looking forward to your early news on this subject and at the same time assuring you that if you need any further information from us we shall gladly furnish same promptly, we are,

Respectfully yours,

THOS. P. GONZALEZ
CORPORATION

Thos. P. Gonzalez
President

TPG:mab

EXHIBIT "G-2"
[Attachment to Kaplan Supplemental Affidavit]

UNITED STATES DEPARTMENT OF AGRICULTURE
COMMODITY CREDIT CORPORATION
WASHINGTON 25, D. C.

OCT 31 1960

Mr. Thos. P. Gonzalez, President
Thos. P. Gonzalez Corporation
1960 South Santa Fe Avenue
Los Angeles 21, California

Dear Mr. Gonzalez:

With reference to your letter dated October 20, 1960, the matter involving your transactions as to beans with Anasae International Corporation is before the Department of Justice for consideration. Until the Department of Justice has concluded its determination and action in this matter, Commodity Credit Corporation will continue in effect the suspension of your company, its officers and affiliates, and other named companies from participating in programs of Commodity Credit Corporation.

Sincerely yours,

/s/ Andrew J. Mair
Vice President

EXHIBIT "H"
[Attachment to Kaplan Supplemental Affidavit]

WESTERN UNION
SENDING BLANK

Call Letters	FGL	NL	Charge To	Thos P Gonzalez Corp	fax losa

WALTER C BERGER JANUARY 15 1959
VICE PRESIDENT
COMMODITY CREDIT CORPORATION
UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON D C

YOUR INVESTIGATION OF ANASAE TRANSACTION IS RECEIVING OUR FULLEST COOPERATION STOP REQUEST THAT INVESTIGATION BE EXPEDITED SO THAT THOS P GONZALEZ CORPORATION MAY BE ABSOLVED AND SUSPENSION LIFTED AT EARLIEST OPPORTUNITY

THOMAS P GONZALEZ
CORPORATION

Thomas P. Gonzalez

EXHIBIT "T"
[Attachment to Kaplan Supplemental Affidavit]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THOMAS P. GONZALES, Defendant.	NO. 30413 CD INFORMATION (7 U.S.C. 1622(h): False Representation.)

The United States Attorney charges:

(7 U.S.C. 1622(h))

On or about September 25, 1959, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant THOMAS P. GONZALES did knowingly represent to the Bank of America, National Trust and Savings Association, through its International Banking Office, 649 South Olive Street, Los Angeles, California, that he had delivered 17,703 sacks of beans, an agricultural product, to Anasae International Corporation, of New York, New York, and that said beans had been officially inspected and graded by an authorized inspector and grader of the United States Department of Agriculture, pursuant to Title 7, United States Code, Chapter 38, whereas, as the defendant then and there well knew, said representation was false in that said beans had not been inspected and graded by an authorized inspector and grader of the United States Department of Agriculture, in violation of Title 7, United States Code, Section 1622 (h).

/s/ FRANCIS C. WHELAN
United States Attorney

WBO:mlm

[Filed Nov. 16, 1962]

DEFENDANTS'
MOTION TO DISMISS: AND ALTERNATIVE
CROSS-MOTION FOR SUMMARY JUDGMENT

Come now the defendants by their attorney, the United States Attorney for the District of Columbia, and respectfully move the Court to dismiss this action on the following grounds:

I. The Court lacks jurisdiction over the subject matter, in that,

(A) The agency action here challenged is entirely committed to agency discretion and made judicially nonreviewable by statute.

(B) Plaintiffs lack standing to sue.

(C) The "unclean hands" maxim applies; and it patently appears that plaintiffs' cause should be dismissed for want of equity jurisdiction.

II. Plaintiffs have failed to state a claim upon which relief can be granted.

Alternatively, defendants cross-move for summary judgment on the ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

Incorporated herein and made a part hereof by attachment are the following affidavits, identified as indicated:

	Government Exhibit
Affidavit of Ford M. Milam, Agricultural Attache, United States Embassy, Rio de Janeiro, Brazil	"A"
Affidavit of Rulon Gibb, Treasurer, Commodity Credit Corporation Department of Agriculture (together with annexed Exhibits 1-14)	"B"

	Government Exhibit
Affidavit of Doyle S. Kennedy, Special Agent, Investigation Division, Agricultural Stabilization and Conservation Service, Department of Agriculture (together with annexed Exhibits 1-23)	"C"
Affidavit of Raymond R. Abbott, Traffic Manager, Moore McCormack Lines, Inc., Los Angeles, Calif. (together with annexed Exhibits A-F)	"D"

In support hereof, defendants herewith submit a Statement of Material Facts and a Memorandum of Points and Authorities.

/s/ DAVID C. ACHESON
United States Attorney

/s/ CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ GIL ZIMMERMAN
Assistant United States Attorney

[Certificate of Service]

[Filed November 30, 1962]

DEFENDANTS' MOTION FOR PROTECTIVE ORDER UNDER RULE 30(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Come now the defendants by their attorney, the United States Attorney for the District of Columbia, and respectfully move the Court for a protective order under Rule 30(b), F.R.C.P.

Defendants pray that such order stay the taking of the deposition of defendant Rulon Gibb, Treasurer, Commodity Credit Corporation, Department of Agriculture, noticed by plaintiffs for December 10, 1962, or any other discovery procedure to which plaintiffs may resort, pending the Court's disposition of defendants' pending motion to dismiss, and the pending cross-motions for summary judgment.

In support of this motion, defendants aver:

1. Defendants have moved for dismissal of the action on the ground of lack of jurisdiction, including the want of equity jurisdiction, as well as on the ground of failure to state a good cause of action, with certified administrative records attached.

2. Defendants verily believe their jurisdictional objections to plaintiffs' maintenance of this suit are well founded, and this Court will dismiss the action upon hearing the said motions.

3. This case involves solely judicial review of agency action; the pertinent agency records have been placed before the Court; and plaintiffs are not entitled to go beyond those administrative records in these review proceedings.

4. Additionally, in their Statement of Material Facts, defendants have fully set forth all the material facts; plaintiffs have filed no opposition thereto; and therefore in no event does good cause for discovery exist in the case.

Defendants further pray that the Court order a temporary stay as to any discovery pending determination of the present motion for protective order.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Gil Zimmerman
Assistant United States Attorney

[Certificate of Service]

[Filed Nov. 30, 1962]

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER, ETC.

Rule 30(b), F.R.C.P.

Allied Poultry Processors Co. v. Polin, 134 F. Supp. 278, 279-280 (D.C. Del. 1955);

See United Transport Service v. National Mediation Board, 85 U.S. App. D.C. 353, 359-360, 179 F.2d 446, 453-454 (1949).

* * *

[Filed December 19, 1962]

ORDER

This cause having come before the Court on defendants' Motion for Protective Order and plaintiffs' Opposition thereto; the Court having heard counsel and being fully apprised in the premises;

It is this 19th day of December, 1962,

ORDERED:

(1) That defendants' Motion for Protective Order under Rule 30(b) of the Federal Rules of Civil Procedure be and the same is hereby granted;

(2) All discovery procedures are stayed pending the Court's disposition of defendants' pending Motion to Dismiss and the pending cross-motions for summary judgment.

/s/ Leonard P. Walsh
JUDGE

[Certificate of Service]

[Filed Jan. 14, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARMEN GONZALEZ, et al., Plaintiffs,	)	
v.	)	Civil Action No. 2922-62
ORVILLE L. FREEMAN, et al., Defendants.	)	

AFFIDAVIT

District of Columbia ss:

Thomas P. Gonzalez, being duly sworn deposes and says that he is a plaintiff in this action and that he is making this affidavit in support of plaintiffs' Motion for Summary Judgment and "Plaintiffs' Opposition to Defendants Motion to Dismiss and Alternative for Summary Judgment."

Attached hereto is the original copy of a letter dated July 17, 1961, from the Collector of Customs, District No. 25, San Diego 1, California written to my attorney, Edward N. Glad. This letter concerns the seizure of 666 bags dry whey and dry milk.

/s/ Thomas P. Gonzalez

[JURAT the 10th day of January, 1963.]

Bernstein, Kleinfeld & Alper

By /s/ Alan H. Kaplan
Attorneys for Plaintiffs

[Certificate of Service]

[Attachment to Affidavit of Thomas P. Gonzalez]

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
SAN DIEGO 1, CALIF.

Office of the Collector
District No. 25
* * *

July 17, 1961
In Reply Refer To:
222/1872 DCU/G

Mr. Edward N. Glad
Glad & Tuttle
354 South Spring Street
Los Angeles 13, California

Dear Mr. Glad:

As requested in your letter of July 7, 1961, a review of the file on Calexico, California, seizure case No. X-302, district case No. 1872, dated February 27, 1957, has now been completed.

The record does not indicate that your client, the Thos. P. Gonzalez Corporation, who on the date of seizure was doing business under the firm name of Gonzalez and Blanco, was in any way a party to the violation which culminated in the seizure of a considerable amount of merchandise, among which were 666 bags dry whey and dry milk.

The record indicates that on April 24, 1957, the firm of Gonzalez and Blanco filed a third party claim petitioning for relief and presented documentary evidence that they had sold the dried milk and whey to one Ignacio Feliz y Cia., a Mexican company, and the actual violator. Gonzalez and Blanco advised they had not received payment for said merchandise.

The petition of Gonzalez and Blanco was thoroughly investigated by this service in an effort to determine whether or not they were in any way involved. There was nothing found in the investigation that would indicate Gonzalez and Blanco or any member of their organization were involved or had any knowledge of the violation. In view of this their petition received favorable consideration and the merchandise was returned to them.

We trust the above explanation of the circumstances surrounding this case will absolve your client of any responsibility in connection with this violation.

Sincerely yours,

/s/ Frank A. Thornton
Collector of Customs

[Filed Feb. 1, 1963]

JUDGMENT

This cause having come before the Court on plaintiffs' motion for summary judgment and defendants' motion to dismiss and alternative cross motion for summary judgment; counsel having been heard; the Court having considered the record and being fully advised in the premises,

It is this 1st day of February, 1963,

ORDERED, ADJUDGED AND DECREED:

(1) That plaintiffs' motion for summary judgment be and the same is hereby denied;

(2) Plaintiffs' motion to strike specified affidavits be and the same hereby is granted;

(3) Defendants' motion for summary judgment be and the same hereby is granted; and

(4) The action be, and the same is hereby, dismissed.

/s/ Burnita S. Matthews
UNITED STATES DISTRICT JUDGE

[Certificate of Service]

[Filed February 26, 1963]

NOTICE OF APPEAL

Notice is hereby given this 25th day of February, 1963, that Plaintiffs Carmen Gonzalez, Thomas P. Gonzalez and Thos. P. Gonzalez, Corporation, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 1st day of February, 1963 in favor of all defendants against said Carmen Gonzalez, Thomas P. Gonzalez, and Thomas P. Gonzalez, Corporation.

BERNSTEIN, KLEINFIELD & ALPER

By: /s/ Alan H. Kaplan

* * *

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17765

CARMEN GONZALEZ, ET AL., APPELLANTS

v.

ORVILLE L. FREEMAN, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
GERALD A. MESSERMAN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Appellants were suspended from doing business with the Commodity Credit Corporation for a period of five years following their admitted participation in an unlawful transaction involving criminal misuse of CCC inspection certificates. Following their debarment, appellants filed an action for declaratory judgment to establishing their eligibility to engage in business with the CCC, and for injunctive relief compelling appellees to discontinue appellants' debarment. Upon cross motions for summary judgment, an order was entered granting appellees' motion.

In the opinion of the appellees, the following questions are presented:

1) Whether the trial court properly granted appellees' motion for summary judgment where:

(A) Appellants did not assert the invasion of a legally protected right, but asserted only that they had been denied the privilege of enjoying additional profits which incidentally accure to the benefit of individuals allowed to deal with the CCC, and asserted further that their criminal conduct did not provide a reasonable basis for denying them that privilege?

(B) The action taken by appellees involved the right to select responsible purchasers—a matter entrusted to the sole discretion of appellees? and,

(C) The administrative decision to suspend further dealings with appellants was made final and conclusive by statute?

2) Whether suspension of further dealings with appellants for a period of five years constitutes an unlawful penalty where the conduct upon which the suspension was predicated seriously jeopardized the achievement of Commodity Credit Corporation's statutory objectives, and persuasively demonstrated that appellants could not be relied upon to comply with their contractual obligations to the CCC, although compliance with such obligations is essential to the lawful operation of the CCC?

3) Whether the procedural requirements of due process of law were satisfied by notifying appellants of the agency's proposed action and the reason such action might be taken, and by

affording appellants an opportunity to present their views in person and by counsel, where appellants did not and do not dispute the truth of the critical fact upon which agency action was finally taken?

4) Whether the Commodity Credit Corporation possesses the authority to refuse to deal with irresponsible purchasers, and whether the exercise of that authority was arbitrary and capricious where predicated upon the suspended purchasers' willful misuse of CCC inspection certificates?

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TABLE OF CASES

*Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

In the fall of 1959, Thomas P. Gonzalez agreed to sell to Anasae International Corporation approximately 17,000 bags of beans for export to Brazil. Under the terms of purchase, the Thos. P. Gonzalez Corporation was required to supply Anasae with Commodity Credit Corporation sanitary certificates certifying that the beans sold had been cleaned and were fit for human consumption. The Gonzalez Corporation had previously purchased an amount of beans from CCC in excess of the amount sold to Anasae. Most of the beans sold to Anasae, however, had been purchased from independent commercial sources. Despite the fact, Gonzalez secured sanitary certificates from CCC on the beans actually purchased from the agency, and applied those certificates to the beans purchased from other sources. Gonzalez used the certificates to obtain payment on a letter of credit issued by Anasae on the beans which it had purchased from Gonzalez. When the ship-

ment of beans from Anasae was received in Brazil, it was found that the shipment contained inferior, low quality, infested beans. Outraged public sentiment was directed toward the United States due to the fact that the beans had been inspected and certified as fit for human consumption by an agency of the United States Government (App. 22–23).[1]

On January 13, 1960, appellants were informed by telegram that they were temporarily debarred from doing business with the CCC pending an investigation into the possible misuse of the CCC inspection certificates applied to beans shipped to Brazil (J.A. 11). The telegram specifically informed appellants that the investigation involved:

> * * * misuse of certificates issued by Commodity Credit Corporation for * * * beans sold to Thomas P. Gonzalez Corporation for export. The certificates which indicated the beans had been cleaned and were fit for human consumption were used by Thomas P. Gonzalez Corporation in connection with a like quantity of beans of questionable quality which were sold to the Anasae Corporation. These beans were exported to Brazil (App. 23).

By letter dated October 31, 1960, appellants were informed that their suspension would be continued until conclusion of an investigation by the Department of Justice (J.A. 11). On May 24, 1961, appellant Thomas P. Gonzalez was indicted on felony charges involving misuse of the CCC inspection certificates (App. 23). Those charges were dismissed when Gonzalez entered a plea of guilty to a misdemeanor charging the fraudulent misuse of those certificates (J.A. 11). In the course of the investigation, appellants were afforded the opportunity to present whatever information they desired relevant to their position. Lengthy written explanations of his conduct were submitted by Gonzalez, and counsel made extensive representations in behalf of appellants. Appellants' counsel had a series of conferences with various officials of the CCC and, on April 18, 1962, submitted a letter to the CCC summarizing appellants' position that further suspension would be improper (J.A. 18–20). On

[1] Certain material unintentionally omitted from the Joint Appendix is included herein. That material constitutes the appendix which begins on page 21.

May 24, 1962, after full consideration of all arguments and information presented in appellants' behalf, the CCC informed appellants that they were suspended from participating in programs of the CCC for a period of five years commencing on January 13, 1960 (App. 23–25). Even before this information was related to appellants, appellants' counsel appealed the action to the Secretary of Agriculture (J.A. 21–23). The Secretary affirmed the debarment and informed counsel that further discussion of the matter would serve no useful purpose unless facts previously not presented were available (J.A. 29). Appellants made no offer to present additional facts.

On September 12, 1962, appellants filed an action in the District Court for a declaratory judgment that the appellants are eligible to participate in any and all programs of the Commodity Credit Corporation, and for an injunction to compel the individual defendants to cease from continuing appellants' debarment (J.A. 1, 4). Appellants moved for summary judgment on November 7, 1962, and appellees filed a cross-motion for summary judgment on November 16, 1962 (J.A. 10, 36). On February 1, 1963, appellees' motion was granted, and appellants' motion denied (J.A. 42).

STATUTES INVOLVED

Title 15 U.S.C., Section 714 provides:

> For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibers (hereinafter collectively referred to as "agricultural commodities"), and of facilitating the orderly distribution of agricultural commodities, there is created a body corporate to be known as Commodity Credit Corporation (hereinafter referred to as the "Corporation"), which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture (hereinafter referred to as the "Secretary"). June 29, 1948, c. 704, § 2, 62 Stat. 1070; June 7, 1949, c. 175, § 1, 63 Stat. 154.

Title 15 U.S.C., Sections 714(b)(g) and 714(b)(m) provide in relevant part:

> The Corporation—
>
> (g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business.
>
> (m) Shall have such powers as may be necessary or appropriate for the exercise of the powers specifically vested in the Corporation, and all such incidental powers as are customary in corporations generally;

Title 15, U.S.C., Sections 714(c)(a), 714(c)(d) and 714(c)(f) provide:

> In the fulfillment of its purposes and in carrying out its annual budget programs submitted to and approved by the Congress pursuant to the Government Corporation Control Act, the Corporation is authorized to use its general powers only to—
>
> (a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations.
>
> (d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities.
>
> (f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities.

Title 5, U.S.C., Section 1009 provides in relevant part:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Title 7, U.S.C., Section 1421 (a) provides:

> (a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

Title 7, U.S.C., Section 1429 provides:

> Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

Title 7, U.S.C., Section 1622 (h) provides:

> The Secretary of Agriculture is directed and authorized:
>
> (h) To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection. Any official certificate issued under the authority of this subsection shall be received by all officers and all courts of the United States as prima facie evidence of the truth of the statements therein contained.

SUMMARY OF ARGUMENT

I

An essential predicate to the exercise of judicial power is the invasion of a legally protected right. Upon the undisputed facts, there was no impairment of a litigable right in the instant case. To do business with the Commodity Credit Corporation is a privilege which does not achieve the dignity of a legally protected right. Suspension of that privilege for a period of five years does not give rise to a justiciable controversy. By committing the power to select responsible purchasers to the sound discretion of the Commodity Credit Corporation, and

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by making the administrative exercise of that power final and conclusive, Congress has precluded judicial review of the exercise of that power.

II

Appellants admittedly committed a wilful violation of their contractual obligations to the Commodity Credit Corporation. The violation involved is so basically destructive to the purposes of the Corporation that it gives rise to criminal prosecution. By their conduct, appellants have demonstrated that further dealings with them might seriously jeopardize achievement of the Corporation's statutory objectives. Suspension of dealings with appellants for that reason does not constitute the imposition of an unlawful penalty.

III

Appellants do not dispute the truth of the critical fact which gave rise to their suspension—that fact being the criminal misuse of CCC inspection certificates. Thus, a trial-type hearing was not necessary to resolve the truth of that fact. There is no statutory requirement that a trial-type hearing be conducted prior to imposition of a limited suspension of the privilege of doing business with the Commodity Credit Corporation. Nor is such a hearing constitutionally required. Appellants were afforded adequate notice of the action to be taken against them and of the reasons for that action. They were given the opportunity to present their position, in person and by counsel, in informal proceedings which preceded their debarment. This procedure fully satisfies the procedural requirements of due process of law.

IV

The power of the Commodity Credit Corporation to suspend dealings with irresponsible purchasers has been judicially recognized. Exercise of that power in the instant case was not arbitrary or capricious. The sanction imposed upon appellants is plainly relevant to the successful achievement of the Corporation's designated objectives, and is reasonably commensurate to the seriousness of the violation committed by appellants. The sanction provides no basis for judicial nullification.

ARGUMENT

I. The trial court properly granted appellees' motion for summary judgment on the ground that Commodity Credit Corporation's refusal to do business with appellants for a period of five years, based upon appellants' admitted criminal misuse of CCC facilities and conceded violation of a basic contractual obligation, gives rise to no justiciable controversy.

A. Refusal to extend to appellants the privilege of enjoying additional profits from purchases of agricultural commodities from the Commodity Credit Corporation does not constitute an invasion of a legally protected right.

In the words of the Supreme Court, "The touchstone to justiciability is injury to a legally protected right * * *" *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 140 (1951). The "touchstone" which appellants rely upon in the instant case is the alleged "legal right to bid with, purchase from, and otherwise deal with the Commodity Credit Corporation." (J.A. 8.) Despite the fact that appellants have demonstrated bad faith amounting to criminal conduct in their dealings with the CCC, (J.A. 6), they assert that the Corporation's refusal to deal with them for a period of five years constitutes an invasion of that "legal right." Evaluation of that claim requires consideration of the nature of the privilege to purchase agricultural commodities from the Government. Properly considered, that privilege does not attain the dignity of a legally protected right. See *Stark* v. *Wickard*, 321 U.S. 288, 306 (1944).

Initially, it should be noted that there is universal judicial acceptance of the proposition that there is no legal right to do business with the Government. *E.g., Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940); *Wooldridge* v. *United States*, 98 U.S. App. D.C. 286, 235 F. 2d 513 (1956). "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. * * *" *Perkins* v. *Lukens Steel Co., supra*, 310 U.S. at 127. The question, then, is whether appellants have a legally protected right *to bid for* the commodities sold by the CCC.

This is not a case where appellants have been deprived of an employment opportunity in private industry as were the appellants in *Homer* v. *Richmond*, 110 U.S. App. D.C. 226, 292 F. 2d 719 (1961). Appellants' right to engage in a chosen trade or profession remains unaffected by their debarment. Compare *Greene* v. *McElroy*, 360 U.S. 474 (1959). The record demonstrates that they have continued to engage in the business of importing and exporting agricultural commodities despite the temporary suspension of their dealings with the CCC. (App. 26). The Corporation's action has not deprived appellants of their principal customer as did the Government's action in *Copper Plumbing & Heating Co.* v. *Campbell*, 110 U.S. App. D.C. 177, 290 F. 2d 368 (1961). In essence, appellants' complaint amounts to an assertion that they have a legally protected right to enjoy increased profits resulting from purchases of agricultural commodities from the CCC at a lower price than would be charged by other suppliers (J.A. 14–15). While increased profits may accrue to purchasers as an incident to the CCC's general activities, those activities were not intended to constitute "a bestowal of litigable rights" upon those desirous of purchasing from the Corporation. *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U.S. at 127; see *Stark* v. *Wickard*, *supra*.

The private interest asserted by appellants is of minimal importance. The governmental function threatened by continued protection of that interest involves the establishment of an effective agricultural marketing system. In these circumstances, it is entirely proper to characterize appellants' interest as a privilege rather than a right. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961). It is a privilege which provides no predicate for judicial action.

B. The power to select purchasers for its commodities is committed to the sole discretion of the Commodity Credit Corporation. Exercise of that discretion is judicially nonreviewable.

Appellants assert that a decision of the Corporation to refrain from doing business with them for a period of five years is judicially reviewable. Rejection of that contention is plainly dictated by Section 10(a) of the Administrative Procedure Act which renders administrative determinations judicially nonreviewable

where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 5 U.S.C. 1009.

Both exemptions are applicable to the type of determination here involved. By clear and specific statutory language, the CCC is given broad discretion to determine with whom it will deal. Acting through the Corporation, decisions of the Secretary of Agriculture on such matters are made final by statute.

The entire statutory scheme which creates the CCC and defines its powers clearly manifests Congressional intent to confer upon the Corporation broad discretionary business powers. 7 U.S.C. 1421 *et. seq.*; 15 U.S.C. 714 *et. seq.* Prior to 1948, the Corporation had existed as a Delaware corporation. In creating the successor corporation, Congress recognized the necessity for creating an organization with powers adequate to cope with the myriad of difficulties inevitably to be presented by the CCC's intended programs.

> The complexity of the demands on the Commodity Credit Corporation is apparent. Its obligations under the price-support programs cannot be readily ascertained. Emergency purchase programs cannot be foreseen at a given time of the year. It is the opinion of the subcommittee that flexibility of operation must be provided in order to carry out these responsibilities. S. Rep. No. 1022, 84th Cong., 2d Sess. 2 (1948).

The broad powers finally conferred upon the CCC forcefully demonstrate legislative effort to provide the necessary "flexibility of operation."

The Corporation exists as "an agency and instrumentality of the United States" organized "for the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequated supplies of agricultural commodities * * * and of facilitating the orderly distribution of agricultural commodities. * * *" 15 U.S.C. 714. To enable it to perform that function, Congress endowed the Corporation with certain specific powers and with "all such incidental powers as are customary in corporations generally." 7 U.S.C. 714(b)(m). Among the specific grants of authority

to the Corporation is the power to "export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities." 7 U.S.C. 714(c)(f). The precise manner in which that goal is to be acheived is not spelled out by statute. Thus, necessarily reposed in the Corporation is a wide discretion to establish the policies and procedures by which its programs are to be implemented. See *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U.S. 604 (1950).

A specific attribute of the Corporation's discretion is the power to select those with whom it chooses to do business. That power is accorded a private business concerned only with the limited purpose of realizing a profit upon its ventures. *E.g.*, *Federal Trade Comm'n.* v. *Raymond Co.*, 263 U.S. 565, 573 (1924). Trusted with a far broader purpose, involving a multiplicity of factors which may directly affect the condition of the entire agricultural marketing system and the reputation of the United States Government, the CCC must be accorded that same power. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940). Implicit in the authority to "enter into * * * such contracts, or agreements as are necessary in the conduct of its business," 15 U.S.C. 714(b)(g), to "dispose of * * * surplus agricultural commodities," 15 U.S.C. 714(c)(d), and to "aid in the development of foreign markets," 15 U.S.C. 714(c)(f) is the right to select the dealers to whom it will sell. More specific ally, the power to select its purchasers is expressly conferred upon the Corporation by the statutory grant of "all such incidental powers as are customary in corporations generally." 15 U.S.C. 714(b)(m).

With such clear evidence of legislative intent to confer upon the CCC discretion to select those to whom it will sell, and with such persuasive statutory articulation of that intent, the conclusion must follow that the Corporation's refusal to deal with appellants for a period of five years constitutes agency action which "is by law committed to agency discretion." 5 U.S.C. 1009. Exercise of that discretion involves the right to select responsible purchasers who will not jeopardize the agency's programs. See *Commodity Credit Corp.* v. *Worthington*, 263 F. 2d 178 (4th Cir. 1959). It has been said that the term "responsible" means "something more than pecuniary

ability; it includes also judgment, skill, ability, capacity, and integrity." *O'Brien* v. *Carney*, 6 F. Supp. 761, 762 (D.C. Mass. 1934). Application of such criteria is not a simple task. "These are matters on which experts may disagree; they involve nice issues of judgment and choice which require the exercise of informed discretion." *Panama Canal Co.* v. *Gray Line, Inc.*, 356 U.S. 309, 317 (1958). Such matters should be finally decided by the agency which bears the responsibility for their decision; they should not be dragged into the courts. Because the debarment of appellants involves a decision committed solely to agency discretion, that decision is judicially nonreviewable. See *Federal Home Loan Bank Bd.* v. *Rowe*, 109 U.S. App. D.C. 140, 284 F. 2d 274 (1960). For that reason alone, summary judgment for appellees is justified.

C. Appellees' determination to suspend further dealings with appellants for a period of five years is made final and conclusive by statute. Judicial review of that determination is thereby precluded.

Another barrier to the exercise of jurisdiction by the trial court exists in the statutory scheme which establishes the CCC and defines the supervisory authority of the Secretary of Agriculture over the activities of the Corporation. The Secretary is expressly authorized to administer the price-support program through the facilities of the CCC. 7 U.S.C. 1421. Determinations of the Secretary implementing the price-support program are "final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act." 7 U.S.C. 1429. Such a "finality provision" ordinarily precludes judicial review of administrative determinations to which the provision is applicable. *E.g.*, *Schilling* v. *Rogers*, 363 U.S. 666 (1960). That the provision applies to the action of the Secretary debarring appellants from participating in programs of the CCC cannot be denied. Appellants do not assert that their debarment is inconsistent with the provisions of the CCC Charter Act. Thus, the specific exemption of 10(a) of the Administrative Procedure Act is here applicable. 5 U.S.C. 1009(a). The relevant statute precludes judicial review thereby rendering the agency determination debarring

appellants judicially nonreviewable. *American & European Agencies* v. *Gillilland, Inc.*, 101 U.S. App. D.C. 104, 247 F. 2d 95, *cert. denied*, 355 U.S. 884 (1957).

II. By committing a violation of a statute designed to protect the integrity of the Commodity Credit Corporation, appellants have demonstrated that further dealings with them would jeopardize the achievement of the corporation's objectives. Suspension of further dealings with appellants, obviously relevant to achievement of those objectives, does not constitute an unlawful penalty.

Appellants' assertion that their debarment is invalid on the ground that it constitutes punishment rests upon the invalid assumption that CCC's sole concern with the sale of agricultural commodities is with the price received (Br. 16–17). That assumption ignores the broad purpose for which the Corporation was created and the complex statutory scheme devised for the achievement of those purposes. See 15 U.S.C. 714 *et seq.* Quite obviously, the interest of the Corporation is not limited to the automatic and unreasoned selection of the highest bidder for a particular commodity. The purchase and sale of agricultural commodities is merely one of the means by which the CCC is authorized to provide price support, to stabilize market conditions, and to encourage the development of a sound and efficient marketing system. 15 U.S.C. 714. Effective exercise of the power to purchase and sell requires that the Corporation refrain from dealing with individuals who would thwart the achievement of those purposes and threaten the integrity of the Corporation. *Commodity Credit Corp.* v. *Worthington*, 263 F. 2d 178 (4th Cir. 1959). By their conduct, defendants strongly demonstrated that further dealings with them would involve just such dangers.

Where suspension of a particular consumer is predicated upon reasons relevant to an agency's achievement of its statutory purposes, that suspension cannot properly be characterized as an improper punishment. *E.g., L. P. Steuart & Bros., Inc.* v. *Bowles*, 322 U.S. 398 (1944); *Copper Plumbing & Heating Co.* v. *Campbell*, 110 U.S. App. D.C. 177, 290 F. 2d 368 (1961). Among the specific statutory aims of the CCC is that

of aiding in the development of foreign markets for agricultural commodities. 15 U.S.C. 714 (c)(f). Inimical to the achievement of that goal is the type of conduct which caused appellants' debarment. By applying CCC inspection certificates to the beans shipped to Brazil, Gonzalez fradulently asserted that the beans were of the quality certified. (App. 23). Disclosure of the falsity of that assertion might seriously impair the reputation of the CCC and destroy the value of the certificates it issues. If foreign consumers do not rely upon the integrity of the Corporation and the reliability of the Corporation's certificates, its ability to aid in the development of foreign markets will be drastically reduced. Refusal to permit appellants the opportunity to further jeopardize the Corporation's reputation is an act which is plainly relevant to the Corporation's lawful purpose.

Appellants' conduct also demonstrated that they could not be relied upon to comply with an essential provision of any contract they might enter into with the CCC. The Corporation's authority to sell agricultural commodities is subject to the express limitation that no sale be made "at less than 5 per centum above the current support price" for the commodity sold. 7 U.S.C. 1427. That limitation does not apply, however, to "sales for export." 7 U.S.C. 1427. Compliance with the statute requires complete cooperation from the dealers to whom goods are sold for export. When goods are sold for export, the contract of sale imposes upon the purchaser an obligation to export which is of the essence. *Sinasen Teicher Inter American Grain Corp.* v. *Commodity Credit Corp.*, 267 F. 2d 493 (2d Cir. 1959). It would not be possible for the CCC to inspect every shipment to foreign lands to make certain that the goods shipped were identical to those sold by the Corporation. The word of the purchaser to that effect must be relied upon in most instances. Gonzalez has shown that his word is not worthy of reliance. His certification that the beans shipped to Brazil were identical to those covered by the inspection certificates was patently false. The inspection certificates had been issued upon beans sold to Gonzalez by the Corporation; the beans to which those certificates were applied were of inferior quality and had been purchased from

other independent sources (App. 23). Prevention of this type of misrepresentation is a matter directly related to the CCC's ability to operate in compliance with the limitations imposed upon it by statute. Debarment of appellants on that basis does not constitute punishment.

Continued dealings with appellants would present another specific danger to the operation of the CCC. By statute, the Secretary of Agriculture is directed and authorized to

> * * * inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce * * * to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire * * *. 7 U.S.C. 1622(h).

The facilities of the Corporation are available to the Secretary for that purpose, and they are so employed. 7 U.S.C. 1421(a). Obviously, this function will be rendered worthless if inspection certificates are misused. Debarment of Gonzalez, an individual who admittedly misused such certificates, is plainly relevant to the successful achievement of the express command in the above statute.

Appellants should not be heard to complain that they have been improperly punished for criminal conduct where use of the sanction imposed by the agency whose rules were violated is essential to the successful operation of that agency's program.

III. The undisputed facts demonstrate that the procedure followed by the Commodity Credit Corporation in suspending business dealings with appellants until January 12, 1965, was in full accord with the requirements of due process of law.

Assuming that appellants' complaint asserts the existence of a legally protected right, the undisputed facts demonstrate that the right asserted has been temporarily withheld in full accordance with the requirements of due process of law. Due process of law is not a frozen concept requiring identical procedures in all circumstances. In *Cafeteria & Restaurant Workers*

Union v. *McElroy, supra,* the Supreme Court cogently expressed the facts which define the requirements of due process:

> * * * [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action. 367 U.S. at 895.

Applying that approach to the instant case, no procedural defect can be found in appellees' action. The government function involved here is that of providing an effective marketing and distribution system for agricultural commodities. Congress has expressly recognized the crucial importance of that function to agriculture and to the Nation. 1946 U.S. Code Cong. Service 1586. The private interest affected in this case is appellants' privilege of enjoying additional profits which result incidentally from the CCC's price-support program. It does not involve appellants' right to remain in their chosen business. A reasonable balancing of these competing interests demonstrates the importance of affording appellees a reasonable amount of freedom in conducting their normal business operations, unfettered by the necessity of conducting formal hearings for the purpose of determining with whom it shall deal. See *R. A. Holman & Co.* v. *S.E.C.*, 112 U.S. App. D.C. 43, 299 F. 2d 127, *cert. denied,* 370 U.S. 911 (1962).

Congress did not deem it necessary to provide for a trial-type hearing for the purpose of determining the issue of whether the CCC could properly refuse to deal with particular individuals. The failure to make such a provision cannot be considered a Congressional inadvertence in view of the express provision for such proceedings to deal with related matters. See 7 U.S.C. 1422. In the absence of any statutory requirement of a trial-type hearing, section 5 of the Administrative Procedure Act does not establish such a requirement. 5 U.S.C. 1004. Nor does the Fifth Amendment render a trial-type hearing mandatory in all cases where Government action impairs a private interest. *Cafeteria & Restaurant Workers Union* v. *McElroy, supra,* 367 U.S. at 894.

Not only is a trial-type hearing not required, but it would be peculiarly inappropriate to the circumstances of the instant case. It is "[a]n elementary proposition that the method of trial is designed for resolving issues of fact." Davis, *The Requirement of A Trial-Type Hearing*, 70 *Harv. L. Rev.* 193, 195 (1956). The facts upon which the CCC acted are not disputed. Gonzalez does not contend that he did not fraudulently misuse CCC inspection certificates, nor do appellants contest the fact that their false certification to the Corporation that the beans shipped to Brazil were identical to the beans they had purchased from the CCC constitutes a fundamental violation of their contractual obligations to the CCC (App. 22–23). The only question to be resolved was whether these facts were sufficient to justify the conclusion that appellants were not responsible purchasers. A trial-type hearing would not be necessary for that determination. See *Mississippi River Fuel Corp.* v. *Federal Power Comm'n*, 108 U.S. App. D.C. 284, 281 F. 2d 919 (1960). The agency determination on that issue should not be lightly regarded. See *Panama Canal Co.* v. *Grace Line, Inc.*, *supra*, 356 U.S. at 318.

The procedure followed in the instant case is essentially similar to that approved by this Court in *Schlesinger* v. *Gates*, 101 U.S. App. D.C. 355, 249 F. 2d 111 (1957). Appellants were adequately informed of the charges against them (J.A. 23). They were afforded an opportunity to be heard and to be represented by counsel in informal proceedings which preceded their debarment. Their position on the legal questions involved was presented in written form on several occasions. No formal oral argument was required on those issues. See *Federal Communications Comm'n* v. *WJR*, 337 U.S. 265 (1949). Full consideration was given by the CCC to the statements and representations made in appellants' behalf. After their debarment had been accomplished, they were afforded further opportunity to present additional facts to the Secretary of Agriculture. They did not choose to exercise that privilege. (App. 23–25). Upon these undisputed facts, there is no deprivation of procedural due process. *Schlesinger* v. *Gates*, *supra*.

If there were any procedural defect in the administrative proceedings, that defect would have no bearing upon the

propriety of the trial court's order. Appellants do not merely assert the right to a hearing. A hearing would be of no value to them since the critical facts upon which the CCC based its action are not in dispute. See *Hyser* v. *Reed,* D.C. Cir., No. 16,716, decided April 11, 1963 (Slip opinion p. 38); also see *Goldsmith* v. *Board of Tax Appeals,* 270 U.S. 117 (1926). The harmless error rule would be applicable to any procedural defect. See 5 U.S.C. 1009; *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205 (1956). The defect, if it existed, would not warrant judicial nullification of appellants' debarment.

IV. Debarment of appellants is relevant to the achievement of the Commodity Credit Corporation's statutory objectives, is not arbitrary of capricious, and was accomplished through the lawful exercise of the Corporation's statutory powers.

Assuming, *arguendo,* that the right to bid for the stock of the CCC constitutes a legally protected right, judicial nullification of appellants' debarment would be warranted only if it could be demonstrated that the Corporation's action was arbitrary and capricious—that it was not reasonably relevant to the achievement of the objectives designated for the Corporation by Congress. *Secretary of Agriculture* v. *Central Roig Ref. Co.,* 338 U.S. 604, 613–14 (1950). Measured by that standard, the propriety of the lower court's decision is obvious. Upon the undisputed facts, the action of the Corporation is entirely reasonable.

The authority of the CCC to cease doing business with irresponsible and untrustworthy dealers has been judicially recognized. *Commodity Credit Corp.* v. *Worthington, supra.* That authority is conferred upon the Corporation in the grant of "all such incidental powers as are customary in corporations generally." 15 U.S.C. 714(b)(m). It is an indispensable adjunct of the Corporation's right to select "responsible buyers." 24 Fed. Reg. 7385 (1959); *Perkins* v. *Lukens Steel Co., supra.*

Appellants' debarment was prompted by a wilful misuse of inspection certificates issued by the CCC. Knowing that these certificates had been issued upon high quality beans sold to

appellant by the Corporation, Thomas Gonzalez knowingly applied these certificates to beans of inferior quality which had been purchased from independent sources (App. 23). There is no dispute regarding Gonzales' guilt of this misrepresentation. It constitutes an act so basically violative of duties imposed upon any individual who exercises the privilege of dealing with the CCC that it is punishable as a crime. On January 17, 1962 Gonzales entered a plea of guilty to that crime (J.A. 11). He does not now protest his innocence. He merely asserts, along with those affiliated with him in the corporation which he heads, that the offense he committed has no bearing upon his reliability as a purchaser. Merely to state the proposition is to demonstrate its frivolity.

Gonzales' action amply demonstrated that he could not be relied upon to fulfill his contractual obligations with the Corporation. His certification that the stock be purchased for export was identical to the stock actually exported was shown to be worthless (App. 22). Reliable certification to that effect is essential to CCC's lawful disposition of agricultural commodities and is made a critical requirement of contracts entered into with the Corporation. 7 U.S.C. 1427; *Sinason Teicher Inter American Grain Corp.* v. *Commodity Credit Corp.*, 267 F. 2d 493 (2d Cir. 1959). Gonzales' criminal misconduct establishes to the satisfaction of all but the most prejudiced observers that he cannot be relied upon to protect the integrity of inspection certificates issued by the CCC. The very purpose of providing for inspection and certification of quality by the CCC is to facilitate trading of agricultural commodities by providing reliable indicia of the quality, quantity, and condition of such commodities. 7 U.S.C. 1622. If CCC must allow the indiscriminate use and application of its certificates, it will be compelled to permit those certificates to be used as instruments for the perpetration of fraud and deceit by unscrupulous purchasers. Such a result would be totally incompatible with achievement of the Corporation's designated objectives.

Continued dealings with appellants would also represent a substantial threat to the CCC's express purpose of expanding foreign markets for agricultural commodities. 15 U.S.C. 714(c)(f). The conduct which caused appellants' debarment

provides a dramatic example of the manner in which an unreliable purchaser of CCC stock can jeopardize that objective. When the beans which appellants sold to Anasae International Corporation reached Brazil, the deleterious condition of those beans caused public indignation (App. 22). The indignation might well have been directed toward the United States Government since an agency of the Government had apparently certified that the beans were of high quality. Only because Gonzalez had fraudulently misused the certificates issued to him by the CCC did such a situation arise. That the Corporation has a legitimate right to prevent similar occurrences in the future can hardly be denied. *E.g., Worthy* v. *Herter,* 106 U.S. App. D.C. 153, 270 F. 2d 905 (1959). That its failure to take corrective action might lead to a reduction in the demand for American agricultural commodities in foreign lands is readily apparent.

In view of all of these circumstances, the CCC had ample cause to believe that appellants could not be relied upon to comply with their contractual obligations and could not be trusted in future dealings. Its suspension of dealings with appellants for a period of 5 years is relevant to the achievement of its statutory goals and is reasonably commensurate to the seriousness of the threat presented by appellants' gross misconduct. The Corporation's reasonable determination, predicated upon misconduct which threatens defeat to the basic purposes for the Corporation's existence, provides no basis for judicial intervention with its judgment. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U.S. 123, 153–54 (1944) (Frankfurter, J., concurring).

Application of the debarment to Carmen Gonzalez is fully justified by the facts in this case. Carmen Gonzales is the secretary-treasurer of the corporation headed by Thomas P. Gonzalez. She is also his sister. To adequately protect its interests in this matter, the CCC had the authority to debar an individual whose interests were closely allied to those of the principal offender, and whose close business association with that offender presented a strong possibility that improper influence might be exercised. See *Commodity Credit Corp.* v. *Worthington, supra.* The prayer for equitable relief in the trial court

is addressed to the court's sound judicial discretion. *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948). In the exercise of that discretion, the court had sufficient evidence upon which it might conclude that the debarment order was properly directed at all persons who had been intimately involved in the unlawful transaction which prompted that order.

CONCLUSION

Wherefore, it is respectfully requested that the judgment of the District Court be affirmed.

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FRANK Q. NEBEKER,
GERALD A. MESSERMAN,
Assistant United States Attorneys.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2922–62

Carmen Gonzalez, et al., Plaintiffs, v. Orville L. Freeman, et al., Defendants

DEFENDANTS' STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 9(h)

Defendants contend there is no genuine issue as to the following material facts:

1. The Commodity Credit Corporation (CCC) is a Government Corporation. It was organized under an Act of Congress to carry on business transactions like private corporations generally. It deals in agricultural commodities, for the purpose of stabilizing, supporting, and protecting farm income and prices, in the national interest, and its organic statute confers upon the CCC broad, discretionary business powers corresponding to those exercised by private business corporations.

2. Among its other authorized business activities, the CCC sells agricultural commodities for export at less-than-statutory-minimum prices. When such sales are made, the CCC necessarily acts in reliance upon the business integrity and representations of the purchaser that the commodities purchased will be disposed of abroad in accordance with the sales contract. In the prudent conduct of its business, the CCC therefore endeavors to entertain offers only from responsible buyers in whose business integrity and representations trust can be placed.

3. Plaintiffs are engaged in the importing and exporting business. Initially, the CCC fully relied on plaintiffs' business integrity and trustworthiness. Sales for export were made to plaintiffs. Export irregularities on plaintiffs' part appeared in various transactions. These irregularities led CCC to require plaintiffs to post a blanket performance bond during a period

running almost three years. But such irregularities were not deemed to warrant the complete suspension of further CCC business dealings with plaintiffs.

4. Thereafter, however, there came to light a deliberate misuse of CCC "sanitary certificates" in connection with a large shipment of beans to Brazil in 1959. This misuse produced a serious international incident which continues to have repercussions adverse to United States trade relations. The CCC then determined that it appeared plaintiffs were responsible for such misuse. Accordingly, in the exercise of its business judgment, the CCC concluded that, if inquiry into the matter so established, plaintiffs should be deemed to lack the requisite business integrity and trustworthiness. The CCC determined to suspend further CCC business dealings with plaintiffs temporarily pending completion of the CCC's inquiry into the matter of fixing responsibility for the misuse of the CCC certificates. This temporary suspension was placed into effect on January 13, 1960.

5. The incident in question came about in the following way:

(A) CCC sanitary certificates were properly issued to plaintiffs, covering a large amount of good quality beans, certified as being clean and fit for human consumption. But inferior quality, infested beans were substituted and shipped to Brazil in 1959 under cover of these CCC sanitary certificates, instead of the good quality beans to which the certificates actually related.

(B) When it was discovered after receipt in Brazil that inferior, infested beans had been shipped under cover of these CCC sanitary certificates, a public furor was created over the matter in Brazil. The Brazilian press reports of the incident conveyed the impression to the Brazilian people that the United States had been responsible for the shipment of "rotten beans" to Brazil. The beans in question, now owned by the Brazilian government, remain rotting in a warehouse in Brazil, and have become totally unfit for human consumption. They have been accumulating storage costs since 1959.

(C) In the opinion of our Agricultural Attaché in Brazil, the shipment of these beans to Brazil under cover of misused CCC

sanitary certificates has "caused great damage to the prestige of United States agricultural trade" and lingers "as an adverse trade factor in relations" between the United States and Brazil.

6. Notice of the CCC's temporary suspension of plaintiffs, including the substance of the specific charge on which it was based, was sent to plaintiffs by telegram dated January 13, 1960, reading as follows:

> This is to notify you that effective immediately the Thomas P. Gonzalez Corporation, its officers and affiliates, are suspended from participating in any programs of the Commodity Credit Corporation pending completion of an investigation regarding misuse of certificates issued by Commodity Credit Corporation for approximately 17,700 hundredweight of beans sold to Thomas P. Gonzalez Corporation for export. The certificates which indicated the beans had been cleaned and were fit for human consumption were used by Thomas P. Gonzalez Corporation in connection with a like quantity of beans of questionable quality which were sold to the Anasae Corporation. These beans were exported to Brazil. This suspension also applies to Gonzalez and Blanco, J. F. Gonzalez Company and the American Chili Powder Company, all of Los Angeles, California.

7. The matter of plaintiffs' apparent misuse of the CCC sanitary certificates in connection with the bean shipment to Brazil was thereafter referred to the Department of Justice for consideration of any action deemed appropriate. On October 31, 1960, the CCC informed plaintiffs that the CCC had determined to continue its suspension of further business dealings with plaintiffs until the Department of Justice had concluded its consideration and action in the matter.

8. Subsequently, on May 24, 1961, plaintiff Thomas P. Gonzalez was indicted on felony charges for misuse of the CCC sanitary certificates. But he pleaded guilty on January 15, 1962 to an information charging him with a misdemeanor in this connection. And the felony indictment was dismissed.

9. In the course of the CCC's inquiry into the matter, plaintiffs were afforded opportunity to present whatever evidence

or information they desired, exculpatory or otherwise; and their counsel had opportunity to and made extensive representations on their behalf:

(A) The principal plaintiff here, Thomas P. Gonzalez, discussed the matter with the special agent assigned to develop the true facts. Additionally, he submitted lengthy explanatory statements in writing, both to the special agent and to the Deputy Director, Grain Division, Commodity Stabilization Service, Department of Agriculture.

(B) Plaintiffs' counsel had a series of conferences with various CCC officials. And on April 18, 1962, counsel submitted a letter to the CCC Executive Vice President, stating—

> Because of the imminence of decision on this suspension matter, it may be best if we briefly summarize our views so that they may be considered by the Commodity Credit Corporation in reaching a decision.

The letter then proceeded to set forth plaintiffs' version of the facts and counsel's views in the matter.

10. Upon conclusion of its administrative inquiry, the CCC determined that plaintiffs should be debarred from further participation in any CCC programs for a period of five years, running from the original suspension date of January 13, 1960. Plaintiffs' counsel was informed by a CCC official that a ruling to this effect was to be issued shortly. Even before the ruling was officially announced, plaintiffs' counsel appealed the matter to the Secretary of Agriculture by letter dated May 17, 1962.

11. Official notices were sent by the CCC on May 24, 1962 to plaintiffs and their counsel, informing them of the 5-year suspension of CCC business dealings with plaintiffs. The notice to plaintiffs stated, in part:

> * * * *after a thorough examination and consideration of the facts surrounding our dealings with you* * * * *and affiliated companies, and the views presented by your attorneys* * * * in a letter dated April 18, 1962 * * * [you] have been debarred from participating in any programs financed by Commodity Credit Corporation for a period of five years. This debarment is effective as of January 13, 1960, the date on which * * *

> [you] were * * * [originally temporarily] * * * suspended. * * * [Emphasis supplied.]

12. Plaintiffs' counsel thereafter made further representations in the matter by letters dated June 1 and 28, 1962, addressed to the Secretary of Agriculture. The Secretary responded by a letter to plaintiffs' counsel dated July 5, 1962. This letter, after making reference to the suspension notices sent to plaintiffs and counsel on May 24, 1962, stated:

> * * * *As you were advised, the debarment action was taken after a thorough examination and consideration of the facts surrounding Commodity Credit Corporation's dealings with* * * * [*plaintiffs*].
>
> This matter has been discussed with you [counsel] on several occasions. The action which we have taken was reviewed by the office of the General Counsel of the Department of Agriculture before action was taken. *We feel that further discussions would serve no useful purpose unless you are in a position to present new facts concerning this matter which heretofore have not been considered.* [Emphasis supplied.]

13. Despite the indication in this letter of Secretary of Agriculture that, if plaintiffs had any new facts to offer, going beyond those which had already been considered, counsel's presentation of such new facts would be entertained, plaintiffs' counsel did not submit any new facts. Nor did counsel even raise any question as to what the facts were "concerning this matter which heretofore * * * [had] * * * been considered." And no further representations on plaintiffs' behalf have since been received.

14. Plaintiffs instituted this litigation on September 12, 1962. An affidavit executed by plaintiff Thomas P. Gonzalez was submitted in support of the complaint. The affidavit states that plaintiffs' business consists "in large measure of the export and import of various agricultural commodities," and that during the preceding 11 years "approximately 30 percent of * * * [plaintiffs'] * * * business has involved participation in Commodity Credit Corporation programs, involving purchase from

that agency of agricultural commodities intended primarily for foreign export."

15. Plaintiff Thomas P. Gonzalez' said affidavit further indicates: The CCC's declination to do further business with plaintiffs for the period running to January 12, 1965, has been simply to place them at an economic disadvantage in the export trade, as compared with their business competitors, with regard to that 30 percent share of plaintiffs' business involving participation in CCC programs. But this suspension action of the CCC does not make it impossible for plaintiffs to continue on in their export-import business. According to the affidavit—

(A) Plaintiffs claim they are sustaining a competitive disadvantage with respect to this 30 percent share of their business because they are now "required to make their purchases [for export] in the open market at prevailing support prices" and cannot now do any "purchasing from Commodity Credit Corporation at prices substantially lower than open market prices."

(B) Plaintiffs have been able to continue on in their export-import business from January 13, 1960, to date, even though the CCC's suspension of further business dealings with them has been in effect during that period of approximately 3 years.

[s] DAVID C. ACHESON,
United States Attorney.

[s] CHARLES T. DUNCAN,
Principal Assistant United States Attorney.

[s] JOSEPH M. HANNON,
Assistant United States Attorney.

[s] GIL ZIMMERMAN,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1965

APPELLANTS' REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17,765

CARMEN GONZALEZ, ET AL.,

Appellants

v.

ORVILLE L. FREEMAN, ET AL.

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' REPLY BRIEF

I.

Contrary to the Repeated Assertions of Appellees in Their Brief, the Facts Upon Which the CCC Acted Are in Serious Dispute. Accordingly, a Proper Hearing Was Imperative (1) To Permit Appellants To Meet Appellees' Charges, and (2) To Resolve the Dispute

From Appellees' brief, it is apparent that their counsel has been laboring under a basic misapprehension. This misapprehension is that "the facts upon which the CCC acted are not disputed." (Appellees' Brief,

p. 16, App. pp. A-1- A-3).[1] While Appellants have never been apprised of all of the supposed facts relied upon by Appellees in arriving at their decision to debar Appellants, it is clear that many of the "facts" alleged in Appellees' brief are not true and such could be easily shown. For example, had the Appellees promulgated appropriate regulations and, under them, notified Appellants of the full bases for their suspension, Appellants, at a hearing involving the particular charges, could have shown that at no time has any of them made any misrepresentation to anyone connected with the CCC. Appellants could have shown that they made no "false certification to the Corporation that the beans shipped to Brazil were identical to the beans they had purchased from the CCC . . ." (Appellees' Brief, p. 16). Appellants could have shown that it was not due to their actions that a shipment to Brazil "contained inferior, low quality, infested beans" and, as a result, Appellants could not have been responsible for any "outraged public sentiment . . . directed to the United States." (Appellees' Brief, p. 2). In short, Appellants could have demonstrated that in their dealings with the CCC each of them has always acted in a responsible and forthright manner.

Appellants fully realize that it is not for this Court to resolve any factual questions in this case. The only reason such factual points are now brought to the Court's attention is to show that the action of the Appellees in debarring Appellants was wholly arbitrary and penal in character in that neither has there been a meaningful opportunity accorded Appellants to meet the charges of the Appellees, nor have regulations of any sort been promulgated by Appellees establishing an orderly procedure for the airing of such charges. Further, there has never been any full articulation of the charges upon which Appellees based their action. It has been only in these court proceedings that any attempt whatever has been made by Appellees to justify the action they have taken. Up

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[1] Certain material omitted from Appellees' addition to the Joint Appendix is included herein. That material constitutes the appendix which begins on page A-1.

until the initiation of this action, Appellees had failed wholly to provide any specifics justifying their action and the specifics now sought to be provided are not only untimely but easily rebutted.

II.

Because of Appellees' Failure to Recognize the Nature of the Right Sought To Be Vindicated By Appellants, They Have Ignored the Principles Set Out By This Court in Homer v. Richmond and Copper Plumbing & Heating Co. v. Campbell

Appellees, in addition to a misapprehension of facts, also have a misapprehension of Appellants' contentions. (Appellees' Brief, p. 7). Appellants do not contend that they have an unrestricted legal right to purchase surplus agricultural commodities from the CCC. Rather, Appellants' contention is that they have a legal right not to be prohibited from seeking to purchase such commodities unless such prohibition is accomplished in a manner consonant with due process of law - a process which Appellants contend must be accorded everyone against whom a particular sanction is sought to be imposed by a government agency. See Willner v. Committee on Character and Fitness, ___ U.S. ___, 10 L. Ed. 2d 224 (1963). This right was succinctly summarized by this Court in Homer v. Richmond, 110 U.S. App. D.C. 226, 229, 292 F.2d 719, 722 (1961) where it was stated that "one may not have a Constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law."

Contrary to what Appellees state, the "legally protected right" asserted by Appellants is not a right to "enjoy increased profits resulting from purchases of agricultural commodities from the CCC at a lower price than would be charged by other suppliers." (Appellees' Brief, p. 8). Rather, the legal right asserted by Appellants, which was violated by Appellees' action, is their right not to have a sanction imposed by the Government except by adherence to the safeguards of procedural and

substantive due process. This is the "private interest" asserted and it clearly is not one of "minimal importance."

The Appellees' distinctions on p. 8 of their brief between the principles involved in this case and those involved in the cases of Homer v. Richmond, supra, and Copper Plumbing & Heating Co. v. Campbell, 110 U.S. App. D.C. 177, 290 F.2d 368 (1961), are without substance. In both of those cases, as in this, there was involved the question of whether governmental action aimed at particular persons and limiting the activities of those persons could be accomplished without adherence to the elements of due process of law. In both of those cases, this Court held adherence to such elements essential. Those elements were found to have been provided, both as to substance and procedure, in Copper Plumbing but lacking, in part at least, in Homer v. Richmond. In Copper Plumbing, moreover, this Court specifically stated that "appellants concededly, in the present posture of the case, were in willful and aggravated violation of their contractual and statutory obligations," 110 U.S. App. D.C. at 180, 290 F.2d at 371, and had been accorded a hearing, 110 U.S. App. D.C. at 181, 290 F.2d at 372. Here, there has been neither a hearing nor any concession of any violation whatever on the part of any of the Appellants of either contractual or statutory obligations under any laws administered by the CCC.

Moreover, in Copper Plumbing this Court fully answered Appellees' contentions as to the justiciability of a controversy of this nature. In that case, this Court distinguished Perkins v. Lukens Steel Co., 310 U.S. 113, as having involved a contest upon "the validity of conditions of general application . . . applied not only to plaintiffs but 'to all other manufacturers in this entire nation-wide industry.' ", 110 U.S. App. D.C. at 179, 290 F.2d at 372. In this case, as in Copper Plumbing, the claim of justiciability is founded upon a different basis than existed in Perkins. Here, Appellants contend that they have been denied equal opportunity to bid for government surplus commodities. This claim is indistinguishable

in substance from that recognized in Copper Plumbing as constituting a "legal wrong" providing access to the courts under the Administrative Procedure Act.

In support of their contention that their actions are "final and conclusive" and not subject to judicial review, the Appellees rely upon American and European Agencies v. Gillilland, 101 U.S. App. D.C. 104, 247 F.2d 95, cert. denied, 355 U.S. 884 (1957). In that case, review was sought of an award by the Foreign Claims Settlement Commission and the Appellant there urged that the Commission had not accorded it the kind of hearing to which it was entitled under the law. Part of Appellant's contention was that the hearing which was required to be held should have included Appellant's being informed of the views of the Commission. In refusing to review the action of the Commission, the Court stated that the "finality" clause in the International Claims Settlement Act of 1949, 64 Stat. 13, 22 U.S.C.A. §§1622-27, precluded judicial review. The Court distinguished cases relied upon by Appellant on the ground that those cases "established the requirements of a fair hearing in situations where a governmental agency was affirmatively acting to the detriment of the complaining party . . .", 101 U.S. App. D.C. at 106, 247 F.2d at 97, and no such action was involved in the determination of the Foreign Claims Settlement Commission. But in this case, this very principle is clearly applicable. Further, even assuming arguendo that the "finality" provision relied upon by Appellees here is relevant (Appellees' Brief, p. 11), the validity of such a provision being applied to the circumstances in this case poses, according to the Court in American and European Agencies v. Gillilland, "a grave and difficult constitutional question.", 101 U.S. App. D.C. at 106, 247 F.2d at 97. However, the "finality" provision, 7 U.S.C. 1429, relied upon by Appellees here is not applicable. Such a provision in its context properly applies only to situations where policy determinations of general applicability are involved, and not where sanctions are imposed upon particular persons.

III.

Appellees Have Failed to Provide Even Colorable Justification for the Suspension of Carmen Gonzalez

In defense of the action taken against Miss Gonzalez, Appellees state: "Carmen Gonzalez is the secretary-treasurer of the corporation headed by Thomas P. Gonzalez. She is also his sister." (Appellees' Brief, p. 19). This is the sole basis for Appellees' statement that by her conduct she has "demonstrated that further dealings with [her] might seriously jeopardize achievement of the Corporation's statutory objectives." (Appellees' Brief, p. 6). To quote one statement from Appellees' brief, "merely to state the proposition is to demonstrate its frivolity."

Respectfully submitted,

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APPENDIX TO APPELLANTS' REPLY BRIEF

[Filed January 5, 1963]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Carmen Gonzalez, et al.	)	
Plaintiffs	)	
vs.	)	Civil Action No. 2922-62
Orville L. Freeman, et al.	)	
Defendants	)	

PLAINTIFFS' "STATEMENT OF GENUINE ISSUES" AND REPLY TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

Come now the plaintiffs, by their attorneys, and in opposition to defendants' motion for summary judgment and the statement of material facts annexed thereto, pursuant to Local Rule 9(h), say, as follows:

FIRST: With respect to many paragraphs, in particular numbers 2, 3, 4, 5, 7, and 8, plaintiffs contend that the "facts" recited are immaterial in that they are beyond the scope of the subject matter of this action which concerns only:

1. Whether defendants have the authority to debar plaintiffs.

2. Assuming such authority, whether the debarment is non-penal and was accomplished by defendants in accordance with due process of law.

SECOND: With respect to the alleged factual representations contained in defendants' statement, plaintiffs contend that there are omissions and inaccuracies in such representations as is more fully set out hereinafter. The paragraph numbers below correspond with and relate to the identically numbered paragraphs in defendants' statement.

1. The purpose for which the Commodity Credit Corporation (CCC) was organized is set out in 15 U.S.C. §714. The statute shows

that the CCC was not organized to function as an ordinary business corporation. Rather it was organized to function only:

> "For the purpose of stabilizing, supporting and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds and fibers (hereinafter collectively referred to as "agricultural commodities"), and of facilitating the orderly distribution of agricultural commodities . . . ." 15 U.S.C. §714.

2. When sales for export are made by the CCC, the CCC endeavors either to obtain its domestic price or satisfactory proof that the commodities have been exported. Failing satisfactory proof of export, the CCC must collect the full domestic price plus additional charges.

3. In order to assure that THOMAS P. GONZALEZ, t/a Gonzalez & Blanco paid the full domestic price or furnished proof of export, CCC did require him to post a bond. Plaintiffs deny that there were 'export irregularities' on their part.

4. Plaintiffs deny that a misuse of CCC "sanitary certificates" produced "a serious international incident." As to CCC's determinations and conclusions, plaintiffs are without information sufficient to form a belief, having been denied discovery thereof.

5. (A), (B), and (C). Plaintiffs deny responsibility for shipping "inferior quality infested beans" to Brazil. Plaintiffs deny responsibility for any "public furor in Brazil."

6. Admitted.

7. Admitted.

8. On January 15, 1962, plaintiff, THOMAS P. GONZALEZ, pleaded guilty to making a false representation to the Bank of America. Previously thereto, the only count of the indictment charging a violation of the Commodity Credit Corporation Act had been dismissed on defendant's motion.

9. Plaintiffs had never been advised of any specific grounds for their debarment other than as set forth in the telegram of January 13, 1960. Without knowledge of such grounds, no meaningful opportunity to present evidence "exculpatory or otherwise existed."

10. Admitted, however, plaintiffs have characterized this 'administrative inquiry' sufficiently in the pleadings herein.

11. Admitted.

12. Admitted.

13. Plaintiffs had never been advised as to those facts "which had already been considered" by defendants in arriving at their decision. As stated in Paragraph 9, the only specific ground known to plaintiffs was that recited in the telegram of January 13, 1960. It was, in large measure, because of this failure to inform that plaintiffs' counsel wrote to defendant, FREEMAN, on May 17 and June 28, 1962, protesting the high-handed and unfair manner and means used by defendants to accomplish plaintiffs' debarment. In his response of July 5, 1962, defendant, FREEMAN, pointedly ignored reference to the thrust of plaintiffs' protests and casually referred to the possible presentation of "new facts." Since plaintiffs had not been informed of the "old facts," the invitation to present "new facts" was obviously hollow and sham.

Further, no answer has ever been obtained from defendants which in any manner explains the debarment of CARMEN GONZALEZ.

14. Admitted.

15. Admitted, except as to unwarranted characterizations therein.

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[Certificate of Service]